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No. _____

In The

Supreme Court of the United States

ARAPAHOE COUNTY PUBLIC AIRPORT AUTHORITY,

Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an airport proprietor, pursuant to the proprietary powers exception, 49 U.S.C. § 41713(b)(3), and the Supremacy Clause of the United States Constitution, U.S. Const. Article VI, cl. 2, may ban an aeronautical use at its airport, such as scheduled passenger service, as necessary for the safe operation of its airport or to serve the civil aviation needs of the public, when the airport proprietor is expressly granted such power by federal regulation and federal grant agreement and when the aeronautical use had not previously operated at the airport.

PARTIES TO THE PROCEEDING

The following entities are parties to the United States Court of Appeals for the Tenth Circuit opinion:

The Arapahoe County Public Airport Authority

The Federal Aviation Administration

The City of Greenwood Village (Intervenor)

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION, STATUTES AND REGULATION INVOLVED	2
STATEMENT OF THE CASE	4
A. The Issue	4
B. The Case Below – Administrative and Judicial Proceedings	5
REASONS FOR GRANTING THE PETITION	11
I. This Court Should Grant The Petition Because The Tenth Circuit's Decision Erroneously Rendered Conclusions of Law Which Directly Conflict With Conclusions of Law Correctly Rendered in a Prior Decision by the Colorado Supreme Court	12
II. The Conflicting Decisions Involve The Important Issue Of Airport Owner/Operators' Proprietary Powers In The Management And Operation Of Airports Within A National Aviation System. Accordingly, A Standard Should Be Established By This Court By Which Lower Courts May Determine When A Matter Truly Impacts The National Aviation System As Opposed To Being A Matter Of Proprietary Power	16
CONCLUSION	19

TABLE OF CONTENTS – Continued

Page

APPENDIX A

Opinion, *Arapahoe County Pub. Airport Auth. v. FAA*, 242 F.3d 1213 (10th Cir. 2001) .....App. 1

APPENDIX B

Final Agency Decision and Order, *Centennial Express Airlines et al. v. Arapahoe County Pub. Airport Auth.*, FAA Order No. 1999-1, 1999 FAA LEXIS 805 (Feb. 18, 1999).....App. 23

APPENDIX C

Order on Petition for Rehearing and Request for Rehearing En Banc, *Arapahoe County Pub. Airport Auth. v. FAA* .....App. 60

APPENDIX D

Opinion, *Arapahoe County Pub. Airport Auth. v. Centennial Express Airlines, Inc.*, 956 P.2d 587 (Colo. 1998) .....App. 62

TABLE OF AUTHORITIES

Page

CASES

American Airlines, Inc. v. Department of Transp., 202 F.3d 788 (5th Cir. 2000), *cert. denied*, 530 U.S. 1284 (2000) 16

Arapahoe County Pub. Airport Auth. v. Centennial Express Airlines, Inc., 956 P.2d 587 (Colo. 1998) ..... *passim*

Arapahoe County Pub. Airport Auth. v. FAA, 242 F.3d 1213 (10th Cir. 2001) ..... *passim*

City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) 16, 18

Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944) 17

Western Air Lines, Inc. v. Port Auth., 658 F. Supp. 952 (S.D. N.Y. 1986), *aff'd*, 817 F.2d 222 (2d Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988) 16

CONSTITUTION

U.S. Const. Article VI, cl. 2 2

STATUTES

28 U.S.C. § 1254(1) 2

49 U.S.C. § 41713(b)(1), (3) 2, 16, 17, 18

49 U.S.C. § 46110(e) 2

49 U.S.C. § 47102(18), (7), and (11) 8

49 U.S.C. §§ 47107(a)(1) 3

TABLE OF AUTHORITIES – Continued

Page

49 U.S.C. § 47107(a)(4) 14

Colo. Rev. Stat. § 41-3-106(1)(h) 3, 14, 17

REGULATIONS

14 C.F.R. Part 16 11

14 C.F.R. Part 152, § 152 Appx. D, ¶ 18 ..... 3, 17

LEGISLATIVE MATERIALS

Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) 16

124 CONG. REC. 38,526 (1978) 17

ADMINISTRATIVE MATERIALS

FAA/OST Task Force Study, *Airport Business Practices and Their Impact on Airline Competition*, Ch. 2 (Oct. 1999) 15

Policy Regarding Airport Rates and Charges, 61 Fed. Reg. 31,994 (1996) 17

OTHER AUTHORITY

P.O. Nüesch, *Rights as a Tool for Airport Management*, The Air & Space Lawyer, Vol. 15, No. 4 (ABA, Spring 2001) 13

PETITION FOR WRIT OF CERTIORARI

The Arapahoe County Public Airport Authority ("Airport Authority") respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit"), entered in this proceeding on March 9, 2001, in order to resolve a direct conflict between the Tenth Circuit and a decision by the Colorado Supreme Court on the important federal question presented herein.

OPINIONS BELOW

The opinion of the Tenth Circuit which gives rise to this petition is reported at 242 F.3d 1213 and is reprinted in the Appendix at App. 1 to App. 22. The Order of the Tenth Circuit, dated May 7, 2001, which denied the Airport Authority's Petition for Rehearing and Request for Rehearing En Banc, is reprinted in the Appendix at App. 60 to App. 61. The Final Agency Decision and Order ("Final Agency Order"), which the Tenth Circuit affirmed by its opinion, is publicly available at 1999 FAA LEXIS 805 and is reprinted in the Appendix at App. 23 to App. 59. The decision of the Colorado Supreme Court, with which the opinion of the Tenth Circuit directly conflicts on the important federal question presented herein, is reported at 956 P.2d 587 and is reprinted in the Appendix at App. 62 to App. 112.

JURISDICTION

The opinion of the Tenth Circuit is dated March 9, 2001. The Tenth Circuit Order denying the Airport Authority's Petition for Rehearing and Request for Rehearing En Banc is dated May 7, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and pursuant to 49 U.S.C. § 46110(e).

CONSTITUTIONAL PROVISION, STATUTES AND REGULATION INVOLVED

U.S. Const. Article VI, cl. 2 provides:

> The Constitution, and Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

49 U.S.C. § 41713(b)(1), (3) provides:

> (1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.
>
> (3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a

certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

49 U.S.C. § 47107(a)(1) provides:

> (1) the airport will be available for public use on reasonable conditions and without unjust discrimination;

14 C.F.R. Part 152, § 152 Appx. D, ¶ 18 provides:

> The Sponsor will operate the Airport as such for the use and benefit of the public. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically agrees that it will keep the Airport open to all types, kinds, and classes of aeronautical use on fair and reasonable terms without discrimination between such types, kinds, and classes. Provided, that the sponsor may establish such fair, equal, and not unjustly discriminatory conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the Airport; And Provided Further, That the Sponsor may prohibit or limit any given type, kind, or class of aeronautical use of the Airport if such action is necessary for the safe operation of the Airport or necessary to serve the civil aviation needs of the public.

Colo. Rev. Stat. § 41-3-106(1)(h) provides:

> (h) To regulate, when acting singly, or by agreement, when acting jointly with any other municipality or county, the receiving, deposit, and removal and the embarkation of passengers or property to or from the airport; to regulate or prohibit any airport hazard; to exact and require

charges, fees, and rentals, together with a lien to enforce the payment; to lease or assign for operation such space or area, appurtenances, appliances, or other conveniences necessary or useful in connection therewith; to own and operate aircraft; to employ pilots; to provide rules and regulations governing the use of such airport and facilities and the use of other property and means of transportation within or over said airport, landing field, and navigation facilities; to perform any duties, necessary or consistent with the regulation of air traffic; to enter into contracts or otherwise cooperate with the United States, the state, or other public or private agencies; and to exercise such powers as may be required or consistent with the promotion of aeronautics and the furtherance of commerce and navigation by air;

STATEMENT OF THE CASE

A. The Issue

The issue addressed by the Colorado Supreme Court and Tenth Circuit, on the same basic facts and with diametrically opposed conclusions, is whether an airport proprietor may ban an aeronautical use, which had never operated at the airport, under the Supremacy Clause of the United States Constitution, the proprietary powers exception set forth in federal statute, and the specific language of federal regulation, as, determined by the airport proprietor to be, necessary for the safe operation of the airport or to serve the civil aviation needs of the public.

This Court has never ruled on the nature and extent of an airport owner/operator's proprietary powers. By this Petition, the Airport Authority is requesting this Court to establish a standard by which lower courts may determine when a matter truly affects the national aviation system as opposed to when, as here, a matter is truly local and proprietary. In essence, does the matter affect air space or does it affect ground space?

B. The Case Below – Administrative and Judicial Proceedings

The Airport Authority is the owner/operator of Centennial Airport ("Centennial"). Centennial was created amid controversy and opened as the Arapahoe County Airport in 1967. To assuage the concerns of the citizenry, the Arapahoe County Commissioners promised that Centennial would be a general aviation reliever airport for Stapleton International Airport and would not permit scheduled passenger service. As such, Centennial was designed and built with Federal Aviation Administration ("FAA") grants as a general aviation reliever airport. Pursuant to national, regional and local planning, Centennial has always operated as a general aviation reliever airport. *See Arapahoe County Pub. Airport Auth. v. Centennial Express Airlines, Inc.*, 956 P.2d 587, 589-590 (Colo. 1998). (App. at 63-67).

The Arapahoe County Commissioners never allowed scheduled passenger service at the airport. In 1975, the Arapahoe County Commissioners created the Airport Authority which, upon creation, became a political subdivision of the State of Colorado. The Airport Authority

Commissioners also never allowed scheduled passenger service at Centennial. *See id.*

In the mid to late 1980s a push was made by certain individuals to conduct scheduled passenger service operations at Centennial.[1] In April 1993, the Airport Authority, in response to the increasing pressure and in reiteration of its twenty-six year position, adopted a moratorium on the review or consideration of applications to conduct scheduled passenger service. This moratorium was quickly followed on May 7, 1993 by a formal application from Centennial Express Airlines, Inc. (the "Airline") to conduct scheduled passenger service at Centennial. Resulting from the Airline's application were three FAA administrative proceedings, one United States Department of Transportation ("DOT") letter, and the directly conflicting Colorado Supreme Court and Tenth Circuit opinions. *See id.* at 589-591. (App. at 63-70); *see Arapahoe County Pub. Airport Auth. v. FAA*, 242 F.3d 1213, 1216-1217 (10th Cir. 2001). (App. at 2-6).

Cumulatively, derived from the foregoing proceedings, eleven Airport Authority principles have been enunciated in support of the ban on scheduled passenger service:[2]

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[1] *See Arapahoe County Pub. Airport Auth. v. Centennial Express Airlines, Inc.*, 956 P.2d 587, 590 (Colo. 1998). (App. at 66). ("Despite Centennial's lack of facilities, private efforts have been made to bring scheduled passenger service to the airport. In response, the Authority has increased efforts to prohibit scheduled passenger service.")

[2] To the extent these principles have been referenced in the Colorado Supreme Court or Tenth Circuit opinions, citations are provided.

1. At the inception of Centennial, the Arapahoe County Commissioners promised the citizens that Centennial would be a general aviation reliever airport only and would not permit scheduled passenger service. *See Arapahoe County Pub. Airport Auth.*, 956 P.2d at 589-590, 595. (App. at 63-67, 80-81).

2. The Commissioners, whether County or Airport Authority, have never permitted scheduled passenger service. *Id.*

3. If an airline is allowed to operate scheduled passenger service at Centennial, all applicants who wish to provide the same service must be allowed to do so. *Id.* at 596. (App. at 83).

4. FAA policy favors commercial service over general aviation and, as such, if there is a capacity constraint, scheduled passenger service will have primacy over general aviation and the Airport Authority could be required to exclude or limit general aviation to accommodate scheduled passenger service, which would be contrary to published national, regional and local planning which designate Centennial as a general aviation reliever airport for Denver International Airport ("DIA"). A general aviation reliever airport, such as Centennial, performs a vital function in the national aviation system by removing the congestion of general aviation aircraft from scheduled passenger service airports. *See id.* at 589-590, 594 n.9, 596-597, 606. (App. at 63-67, 77-78, 83-84, 107-108).

5. The Airport Authority's Minimum Standards for Commercial Aeronautical Activity ("Minimum Standards") define Centennial's "Airport Purpose" as "any Authority action, undertaking or development that is

consistent in maintaining the non-certificated status of the Airport and in preserving the Airport funding category as a 'Reliever Airport' serving general aviation users. Under no circumstance shall the Airport Purpose include scheduled passenger services." *See id.* at 590. (App. at 66-67).

6. Scheduled passenger service operations could transform Centennial from a "Reliever Airport" to a "Commercial Service Airport" and then to a "Primary Airport". If Centennial becomes a "Primary Airport" it would have to compete with DIA for federal grant agreements.[3] *See id.*

7. The Code of Federal Regulations and the FAA's grant agreements state that the Airport Authority "may prohibit or limit any given type, kind or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public." *See id.* at 589; (App. at 64); *Arapahoe County Pub. Airport. Auth.*, 242 F.3d at 1222; (App. at 18); 14 C.F.R. Part 152, § 152 Appx. D, ¶ 18.

8. The Colorado Supreme Court has determined that the Airport Authority's ban on scheduled passenger service falls squarely within its proprietary powers and the ban on scheduled passenger service is necessary for the safe operation of the airport and serves the civil

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[3] Definitions of "reliever airport", "commercial service airport" and "primary airport" are set forth in 49 U.S.C. § 47102(18), (7), and (11) respectively. The lack of comparability of facilities between Centennial and DIA supports how incongruous it would be to have Centennial and DIA in the same funding category.

aviation needs of the public. *Arapahoe County Pub. Airport Auth.*, 956 P.2d at 595-597. (App. at 79-84).

9. Centennial is approaching its capacity. As such, current FAA policy would allow a general aviation reliever airport such as Centennial to ban scheduled passenger service if Centennial was in a multi-airport system under one owner. Local, regional and national planning has designated Centennial as a general aviation reliever airport in a multi-airport system. Such planning is consistent with and the functional equivalent of FAA's policy that allows a multi-airport proprietor to ban scheduled passenger service at a general aviation reliever airport in order to maintain the attractiveness of the general aviation reliever airport to general aviation. *See id.* at 591, 597. (App. at 68, 83-84).

10. Airport planners and architects designed Centennial to accommodate general aviation and not scheduled passenger service. Centennial's design does not include a terminal, a baggage system, adequate parking and adequate security necessary to accommodate scheduled passenger service. *See id.* at 590, 596. (App. at 66, 83).

11. The National Transportation Safety Board ("NTSB") recommends that scheduled passenger service be only at certificated airports with on-the-airport fire and rescue services. Centennial is not certificated. Centennial has to rely on off-the-airport and non-exclusive fire protection services. In the event of an accident the fire department cannot meet a three-minute fire response time at Centennial. The significance of the three-minute fire response time is that if a fire department does not have the fire controlled and mostly extinguished within three minutes, the chance of having survivable victims is

zero. *See Arapahoe County Pub. Airport Auth.*, 242 F.3d at 1223 n.10. (App. at 20).

As noted, the Colorado Supreme Court ruled in *Arapahoe County Public Airport Authority v. Centennial Express Airlines, Inc.*, 956 P.2d 587 (Colo. 1998) that the Airport Authority's Minimum Standards and ban on scheduled passenger service are not preempted by federal law and do not violate the grant assurances given to the federal government. Further, the Colorado Supreme Court held that the ban on scheduled passenger service is necessary for the safe operation of Centennial and serves the civil aviation needs of the public. *Id.* at 593-597. (App. at 74-85). On "the same basic facts," the Tenth Circuit upheld the FAA's termination of the Airport Authority's eligibility for federal grant agreements, concluding, in part, "the Authority's ban on scheduled passenger service is preempted by statute and the Supremacy Clause;. . . . " *Arapahoe County Pub. Airport Auth. v. FAA*, 242 F.3d 1213, 1217, 1224 (10th Cir. 2001). (App. at 5, 22).

The Tenth Circuit initially held that "the strong policy of federal supremacy in the field of aviation prevails over full faith and credit principles in this case. The Colorado Supreme Court's decision in *Arapahoe County Public Airport Authority v. Centennial Express Airlines* therefore has no bearing on the FAA decision before us." *Id.* at 1221. (App. at 15). In initially dismissing the Colorado Supreme Court opinion, the Tenth Circuit stated (1) that the Colorado Supreme Court addressed issues of preemption and grant assurances in a "narrow context", (2) the Colorado Supreme Court's grant agreement conclusion lacks the "depth and breadth" of the FAA analysis, and (3) that it was a plurality opinion. *Id.* at 1219. (App. at 10-11). The Tenth Circuit then proceeded to

determine that (1) the ban on scheduled passenger service is preempted and (2) the record supports the FAA's findings that the Airport Authority acted unreasonably in exercising its proprietary powers.[4] *Id.* at 1221-1224. (App. at 15-21).

REASONS FOR GRANTING THE PETITION

The Airport Authority respectfully requests this Court to grant its Petition for two reasons:

1. First, on the same basic facts, the Tenth Circuit erroneously rendered conclusions of law on the Supremacy Clause and proprietary powers exception that were diametrically opposed to the correct conclusions of law rendered by the Colorado Supreme Court. The Tenth Circuit opinion ignored the thoughtfully considered proprietary powers and grant agreement analysis of the Colorado Supreme Court. This analysis focused on the power of an airport to control and determine its size and facilities. The analysis also ascribed to the importance of the historical and the national, regional, and local planning pertaining to Centennial.

[4] The FAA's statement of facts and, to the extent addressed, the FAA's positions on the Airport Authority's positions are set forth in the Final Agency Order at App. 24 to App. 29 and App. 40 to App. 57. The FAA's defense of its multiple roles in the 14 C.F.R. Part 16 fact finding and decision making process is set forth in App. 39 to App. 40.

2. Second, these conflicting decisions involve the important issue of an airport owner/operators' proprietary powers in the management and operation of airports within a national aviation system. Accordingly, a standard should be established by this Court by which lower courts may determine when a matter truly impacts the national aviation system as opposed to being a matter of local, proprietary power. The Airport Authority submits that the standard should be based, consistent with the Colorado Supreme Court decision, on whether the exercise of proprietary power pertains to the air space, i.e., operation of aircraft, or whether it pertains to ground space, i.e., facilities and planning.

I. This Court Should Grant The Petition Because The Tenth Circuit's Decision Erroneously Rendered Conclusions of Law Which Directly Conflict With Conclusions of Law Correctly Rendered in a Prior Decision by the Colorado Supreme Court

The Tenth Circuit acknowledged that "the same basic facts" were before the Colorado Supreme Court and the Tenth Circuit. *See Arapahoe County Pub. Airport Auth.*, 242 F.3d at 1217. (App. at 5). Yet on these "same basic facts", the Colorado Supreme Court and Tenth Circuit reached directly conflicting conclusions pertaining to the Airport Authority's ban on scheduled passenger service.

The Colorado Supreme Court concluded that the ban on scheduled passenger service was not preempted by federal law but is a valid exercise of proprietary powers. *Arapahoe County Pub. Airport Auth.*, 956 P.2d at 593-596. (App. at 74-81). The Colorado Supreme Court specifically recognized:

> While regulations concerning aircraft noise and ground congestion restrict the manner in which airport users conduct their operations, a ban on scheduled service seeks to accomplish a more fundamental goal in setting the boundaries of permissible operations at the airport. *The power to control an airport's size exists at the core of the proprietor's function and is especially strong where, as here, the prohibited use has never been allowed, or even contemplated.* (citation omitted) (emphasis added).

Id. at 595. (App. at 80-81). The Colorado Supreme Court correctly perceived the issue as one of the Airport Authority maintaining the status quo of its facilities, as contrasted to being forced to expand its facilities. *See also id.* at 596 n.12. (App. at 82). ("Further, *City of Dallas* concerned a ban enacted after that airport proprietor had previously allowed scheduled passenger operations at the airport. Therefore, facilities and procedures were already in place to accommodate scheduled passenger service. Such is not the case at Centennial where scheduled passenger service has never been permitted.")

One commentator has noted:

> These types of facility decisions have traditionally been left up to the airport proprietor. Lately, however, DOT has begun to make the argument that airports may be obligated to accommodate new service. FAA/OST Task Force Study, Airport Business Practices and Their Impact on Airline Competition, ch. 2 (Oct. 1999).

P.O. Nüesch, *Rights as a Tool for Airport Management*, The Air & Space Lawyer, Vol. 15, No. 4 at 10 n.29 (ABA,

Spring 2001). This lack of facilities, which, as set forth above, is only one of the reasons why the Airport Authority bans scheduled passenger service, clarifies the dispute over the national versus local, proprietary power.[5]

The Airport Authority's position is that because it does not have the facilities for scheduled passenger service, it may ban scheduled passenger service as necessary for the safe operation of the airport. Further, and most importantly, it cannot be required to build facilities to accommodate scheduled passenger service. Rather, it may continue to operate as it was designed and built – as a general aviation reliever airport.

The FAA's present viewpoint requires the Airport Authority to expand and build the scheduled passenger service facilities. As stated in the FAA/OST study cited by Mr. Nüesch:

> FAA has interpreted the reasonable access provision as requiring access for new entrants. . . . FAA determined that some arrangements for accommodation must be made if reasonably possible, *and that a carrier may not be denied access to an airport solely based on the non-availability of currently existing facilities.* In some cases, the airport operator may provide temporary facilities, such as a mobile ticket office and gate facilities, to relieve the situation. Otherwise, FAA and the

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[5] The Colorado Supreme Court also recognized that the Airport Authority's actions were pursuant to state law (citing Colo. Rev. Stat. § 41-3-106(1)(h)), national, regional, and local planning, non-discriminating and addressed exclusive rights (citing 49 U.S.C. § 47107(a)(4)). *See Arapahoe County Pub. Airport Auth.*, 956 P.2d at 594-597. (App. at 77-84).

> airport operator together can develop a solution to the problem. . . . (emphasis added)

FAA/OST Task Force Study, *Airport Business Practices and Their Impact on Airline Competition*, Ch. 2 at 16 (Oct. 1999).

The Tenth Circuit is correct that "the Authority relies largely on the Colorado Supreme Court's conclusion the ban on scheduled passenger service was, indeed, necessary for the safe operation of Centennial Airport and to serve the public's civil aviation needs." *Arapahoe County Pub. Airport Auth.*, 242 F.3d at 1221. (App. at 15). The Tenth Circuit is also correct that the Airport Authority maintains that "the scheduled passenger service ban is *per se* an exercise of its propriety [sic] power, . . . " *Id.* at 1222. (App. at 18).

The Colorado Supreme Court correctly realized that the Airport Authority was not adversely impacting the operation of aircraft, which is the traditional sphere of the FAA, but rather acting as an owner of an airport without the facilities to support scheduled passenger service, and which owner did not wish to expand its facilities. The Airport Authority asserts that it has the absolute right to decide not to build scheduled passenger service facilities. One effect of the Tenth Circuit decision is to sanction the FAA's withholding of funds unless and until the Airport Authority agrees to expand its facilities to accommodate scheduled passenger service.

However, more is at stake here than whether or not the Colorado Supreme Court or the Tenth Circuit is right. For these conflicting decisions may have been avoided if a standard had been established for determining the nature and extent of an airport owner's proprietary

powers. However, such a standard has never been established. *See Arapahoe County Pub. Airport Auth.*, 242 F.3d at 1222; (App. at 18); *American Airlines, Inc. v. Department of Transp.*, 202 F.3d 788, 806 (5th Cir. 2000), *cert. denied*, 530 U.S. 1284 (2000); *Western Air Lines, Inc. v. Port Auth.*, 658 F. Supp. 952, 956 (S.D. N.Y. 1986), *aff'd*, 817 F.2d 222 (2d Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988); *Arapahoe County Pub. Airport Auth.*, 956 P.2d at 595 (App. at 80). ("There are no cases that address the specific question posed by the present case.").

II. The Conflicting Decisions Involve The Important Issue Of Airport Owner/Operators' Proprietary Powers In The Management And Operation Of Airports Within A National Aviation System. Accordingly, A Standard Should Be Established By This Court By Which Lower Courts May Determine When A Matter Truly Impacts The National Aviation System As Opposed To Being A Matter Of Proprietary Power

Prior to the enactment of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) ("ADA"), this Court noted, but did not determine, "what limits, if any, apply to a municipality as a proprietor." *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 635-636 n.14 (1973). When the ADA was enacted the proprietary powers of airport owner/operators was expressly reserved. *See* 92 Stat. at 1708, as now codified at 49 U.S.C. § 41713(b)(3). In the legislative history for the ADA, Congressman Anderson stated: "It was not the intent of the House conferees to limit in any way the normal exercise of a proprietor's powers to determine the

level and nature of service to be provided at airports, subject to constitutional and statutory limitations." 124 CONG. REC. 38,526 (1978). This Court has not since revisited the proprietary powers issue.

The Airport Authority asserts, pursuant to 49 U.S.C. § 41713(b)(3), 14 C.F.R. Part 152, § Appx. D ¶ 18, and Colo. Rev. Stat. § 41-3-106(1)(h), that it has the proprietary power to ban the aeronautical use of scheduled passenger service. The FAA has defined "the aeronautical use of an airport to be any activity that involves, makes possible, is required for the safety of, or is otherwise directly related to, the operation of aircraft. Aeronautical use includes services provided by air carriers related directly and substantially to the movement of passengers, baggage, mail and cargo on the airport." Policy Regarding Airport Rates and Charges, 61 Fed. Reg. 31,994, 32,017 (1996). The emphasis is on the operation of aircraft. The Airport Authority submits therefore that a bright line distinction is that the FAA rules supreme in the operation of aircraft. *Cf. Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring) ("Federal control is intensive and exclusive. Planes do not wander about the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls."). The airport proprietor, however, acting as owner and landlord of the ground space, must determine whether it has the facilities available to accommodate an aeronautical use, e.g., is there a terminal, baggage facilities, security to protect users, and

parking? In essence, if a proprietor does not have the facilities to accommodate an aeronautical use, it may choose whether to build the facilities or ban the use. *Cf. City of Burbank*, 411 U.S. at 644 ("Furthermore, while Congress clearly intended to pre-empt the States from regulating aircraft in flight, the author of the bill, Senator Maroney, specifically stated that FAA would not have control 'over the ground space of' airports." (footnote omitted) (Rehnquist, J. dissenting).

The actions of the FAA with respect to the Airport Authority, the comment by Mr. Nüesch previously cited, and the FAA/OST study previously cited all support that the FAA seeks to expand its power to include dictating the construction and expansion of facilities at airports. If such expansion of power is sanctioned, as it has been by the Tenth Circuit, then what is left of proprietary powers? The general preemption rule of 49 U.S.C. § 41713(b)(1) will have swallowed the proprietary powers' provision of 49 U.S.C. § 41713(b)(3) and rendered it a nullity, contrary to the intent of Congress.

The Airport Authority respectfully submits a proprietor cannot be forced to expand its facilities to accommodate an aeronautical use. Under the standard that the airport proprietor, and not the FAA, controls the ground space owned by the proprietor, the Colorado Supreme Court correctly upheld the ban on scheduled passenger service as a valid exercise of proprietary power and the Tenth Circuit erred as a matter of law in concluding the ban was preempted because the Airport Authority did not reasonably exercise its proprietary powers.

The reasons asserted by the Airport Authority and adopted by the Colorado Supreme Court – design and lack of facilities, as well as national, regional and local planning, are within the traditional powers of the owner/landlord. The exercise of these powers preserved a now 34 year old status quo of the ground space and did not impact the flight of aircraft, the path of aircraft, the altitude of aircraft, the qualifications of the pilots or the airworthiness of the aircraft. All of those matters are clearly within the province of the FAA.

Accordingly, the Airport Authority is petitioning this Court to establish a standard for proprietary powers – does the matter at issue pertain to ground space or does it pertain to air space? If it pertains to ground space, it is within an airport owner's proprietary powers, subject to court review.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated August 2, 2001.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ARAPAHOE COUNTY PUBLIC AIRPORT AUTHORITY, a political subdivision of the State of Colorado,	)	No. 99-9508
Petitioner,	)	(Filed Mar. 9, 2001)
v.	)	
FEDERAL AVIATION ADMINISTRATION,	)	
Respondent,	)	
CITY OF GREENWOOD VILLAGE,	)	
Intervenor.	)	
REGIONAL AIRLINE ASSOCIATION,	)	
Amicus Curiae.	)	

Appeal from the Federal Aviation Administration

Brian A. Magoon (Ronald S. Loser with him on the briefs) of Brega & Winters, P.C., Denver, Colorado, for Petitioner.

Christine N. Kohl (David W. Ogden, Acting Assistant Attorney General, and Michael Jay Singer, Department of Justice, with her on the brief), Department of Justice, Washington, D.C., for Respondent.

Constance E. Brooks (Michael B. Marinovich and Christine A. Longhitano with her on the briefs) of C.E. Brooks & Associates, P.C., Denver, Colorado, for Intervenor.

Before **BRORBY** and **McWILLIAMS**, Circuit Judges, and **ELLISON**,* District Judge.

BRORBY, Circuit Judge.

This case involves the Federal Aviation Administration's (FAA) decision to suspend petitioner's eligibility for discretionary federal grants, based on claimed violations of federal statutes and existing grant provisions. Petitioner Arapahoe County Public Airport Authority (Authority) and Intervenor City of Greenwood Village (City) urge us to set aside the decision for various reasons, not the least of which is the decision is incompatible with an earlier opinion issued by the Colorado Supreme Court. We exercise jurisdiction pursuant to 49 U.S.C. §§ 46110 and 47106(d)(3). For the reasons set forth below, we deny the Petition for Review and affirm the FAA's order.

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* The Honorable James O. Ellison, Senior United States District Judge for the Northern District of Oklahoma, sitting by designation.

BACKGROUND[1]

The Authority owns and operates Centennial Airport, which is located just south of Denver, Colorado. Operations at the airport historically have consisted of "unscheduled" commercial passenger and cargo service. In the course of operating the airport, the Authority has accepted millions of dollars in discretionary grants from the FAA. As part of the grant process, the Authority made assurances the airport would be "available . . . for public use on reasonable terms and without unjust discrimination, to any person, firm, or corporation to conduct or to engage in any aeronautical activity for furnishing services to the public at the airport." However, within the same grant assurance, the FAA also recognized the Authority "may prohibit or limit any given type, kind or class of aeronautical use . . . if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public."

Over the course of several years, Centennial Express Airlines (Centennial Express) divulged an interest in providing scheduled passenger service at Centennial Airport, culminating in an official application in May 1993. Centennial Express submitted its application despite the Authority's actions one month earlier placing a moratorium on the consideration of applications for scheduled passenger service. The moratorium was designed to provide the Authority time to determine whether it could

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[1] The Authority states in its brief the only issues on appeal are legal in nature. Therefore, the facts presented in the background section of this opinion draw extensively from the FAA's decision.

legally prohibit scheduled service. While the Authority asked for guidance from the FAA on the question, it ultimately decided to completely ban all scheduled air carrier service without waiting to hear from the FAA.[2] In contravention of the Authority's ban, Centennial Express initiated scheduled passenger service between Centennial Airport and Dalhart, Texas on December 20, 1994. The Authority immediately sought and obtained a temporary injunction in state district court to prevent Centennial Express from offering scheduled passenger service.

The state district court eventually granted the Authority a permanent injunction. Centennial Express successfully appealed the injunction to the Colorado Court of Appeals, but a plurality of the Colorado Supreme Court reversed the state court of appeals and reinstated the permanent injunction. *See Arapahoe County Pub. Airport Auth. v. Centennial Express Airlines, Inc.*, 956 P.2d 587 (Colo. 1998) (en banc). The Colorado Supreme Court issued its opinion despite concurrent complaints on file with the FAA, and in so doing decided federal law did not preempt the Authority's ban on scheduled passenger service and the ban did not violate the terms of

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[2] The Authority wrote the FAA in July 1993, and adopted the ban in September 1994. The FAA responded in December 1994. The FAA response was not favorable to the ban, stating: "In addressing similar cases in the past, [the] FAA has found it arbitrary to exclude any particular class of service due to factors that are not reasonably related to the impacts of that service." The FAA also found the Authority submitted insufficient information "to demonstrate that a restriction of any particular category of operation could be adequately supported," and concluded "existing policy on airport access must be complied with."

the non-discrimination grant assurances. *See id.* at 592-97. The FAA was not a party to this state litigation.

As alluded to in the previous paragraph, the agency decision-making process under review here got its start at the same time as the state litigation, and involves the same basic facts. Thomas Kehmeier, a Centennial Express stockholder, filed the first complaint with the FAA in August 1994, claiming the Authority's ban violated federal law and the grant assurances. Centennial Express filed its own complaint in January 1995. As the Colorado Supreme Court noted, the FAA had yet to rule on either complaint in 1998 when the court issued its opinion. *Arapahoe County Pub. Airport Auth.*, 956 P.2d at 592. These initial complaints were filed pursuant to 14 C.F.R. Part 13. New rules, found at 14 C.F.R. Part 16, and entitled "Rules of Practice for Federally-Assisted Airport Enforcement Proceedings," went into effect December 16, 1996. Centennial Express filed a second complaint under the new part 16 rules on February 23, 1998, just two months prior to the Colorado Supreme Court's decision. Centennial Express filed the second complaint even though the company had voluntarily surrendered its FAA operating certificate in January 1996.

After consolidating the three complaints, and despite the then-existing Colorado Supreme Court decision to the contrary, FAA's Director of the Office of Airport Safety and Standards issued an initial determination on August 21, 1998, concluding the ban violated the grant assurances and federal law. The Authority requested a

hearing,[3] which was held over two days in November 1998, and resulted in an affirmance of the director's initial decision. The Authority and the City subsequently appealed the hearing officer's decision to the FAA Associate Administrator for Airports, who issued the FAA's Final Agency Decision and Order affirming the previous decisions. The Authority then filed the current petition for review, and the City filed a Notice of Intervention pursuant to 10th Circuit Rule 15.2(A).[4]

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[3] The hearing officer granted the City's motion to intervene; therefore, the City also participated in the hearing.

[4] The FAA argues the City is without statutory authority to intervene in this review. We assume for purposes of this opinion, but do not decide, that the City's intervention is proper. However, as an intervening party, the City may join issue only on matters brought before the court by the Authority as petitioner. *See Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990) (citing *Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498 (1944) ("an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues")). We acknowledge this limitation is a prudential determination as opposed to a mandate of rule or statute, *see Synovus Fin. Corp. v. Board of Governors*, 952 F.2d 426, 433-34 (D.C. Cir. 1991); nonetheless, we agree it should be avoided only in "extraordinary cases." *New York v. Reilly*, 969 F.2d 1147, 1154 n.11 (D.C. Cir. 1992). This is not an extraordinary case. The City's issues, as a whole, are directed toward the complainants' standing, alleged due process deficiencies, mootness and laches. Although the City summarily characterizes these issues as related to "prudential jurisdictional deficiencies," after careful examination we conclude the City's issues are not "essential predicates" or substantively connected to the issues the Authority presented in its brief and Petition for Review. *See United States Tel. Ass'n v. FCC*, 188 F.3d 521, 530-31 (D.C. Cir. 1999). Moreover, the City presents no reason why it could not have petitioned for review

STANDARD OF REVIEW

Our review of the FAA's final decision and order suspending the Authority's eligibility for discretionary federal grants is governed by the Administrative Procedure Act, 5 U.S.C. § 706.[5] Within this context, we review matters of law de novo. *See Wyoming Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1231 (10th Cir. 2000). However, the FAA's findings of fact are conclusive if supported by substantial evidence. *See id;* 49 U.S.C. § 46110(c). The substantial-evidence standard does not allow us to displace the FAA's "choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." *Babbitt*, 199 F.3d at 1231 (quotation marks and citation omitted); *see also Trimmer v. United States Dep't of Labor*, 174 F.3d 1098, 1102 (10th Cir. 1999) (same).

ANALYSIS

The Authority contends the final FAA decision and order should be set aside for the following three "errors

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in its own right. *See id.* at 531. We therefore decline to consider issues raised by the City but not the Authority.

[5] A reviewing court may set aside an agency determination pursuant to 5 U.S.C. § 706(2) if it is (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (d) without observance of procedure required by law; (e) unsupported by substantial evidence; or (f) unwarranted by the facts to the extent they are subject to de novo review. 5 U.S.C. § 706(2); *see Lewis v. Babbitt*, 998 F.2d 880, 881-82 (10th Cir. 1993).

of law:" (1) the Colorado Supreme Court opinion reinstating the permanent injunction against Centennial Express "is final, preclusive and dispositive;" (2) the Authority and not the FAA determines whether scheduled passenger service will be prohibited as necessary for the safe operation of the airport and to serve the public's civil aviation needs; and (3) any allowable scheduled passenger service must be limited to aircraft designed for nine or fewer passenger seats.[6] We address each alleged error in turn.

The Colorado Supreme Court Decision

The Authority argues, pursuant to the Full Faith and Credit Act, 28 U.S.C. § 1738, that *Arapahoe County Public Airport Authority v. Centennial Express Airlines*, 956 P.2d 587, "is final, preclusive and dispositive" of the issues resolved in the FAA's final order. The Full Faith and Credit Act provides that the "judicial proceedings of any court of any such State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." 28 U.S.C. § 1738.

The FAA asserts 28 U.S.C. § 1738 is not technically implicated here because it is an agency rather than a

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[6] The City, as Intervenor, joins in this third issue, contending "FAA acted outside or abused its authority when it prosecuted [the Authority] for banning scheduled passenger service after Congress amended the federal aviation laws to prohibit scheduled passenger service of more than 10 seats at uncertified airports and to further provide that no airport can be compelled to secure a certificate."

court, *see American Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 799 (5th Cir.), *cert. denied*, 120 S. Ct. 2762 (2000); however, "[b]ecause most agency decisions may be reviewed in federal courts, and those courts must follow section 1738, [the FAA] therefore assume[s] that a common law rule of preclusion, like that embodied in section 1738, governs federal agency proceedings." We agree with the FAA and the Fifth Circuit that the preclusive effect, if any, of the Colorado Supreme Court decision derives from the common law doctrines of res judicata and issue preclusion (collateral estoppel), not § 1738. *See id.* at 799-800 & n.6. We further agree these common law doctrines extending full faith and credit to state court determinations are trumped by the Supremacy Clause if the effect of the state court judgment or decree is to restrain the exercise of the United States' sovereign power by imposing requirements that are contrary to important and established federal policy. *See id.* at 800; *see also Midgett v. United States*, 603 F.2d 835, 845 (Ct.Cl. 1979). Balancing, de novo,[7] the common law justification for full faith and credit with the competing policy supporting the Supremacy Clause, we conclude the FAA is not required to give preclusive effect to the Colorado Supreme Court's decision in *Arapahoe County Public Airport Authority v. Centennial Express Airlines.*

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[7] *See American Airlines*, 202 F.3d at 799 (declining to defer to agency's ruling on full faith and credit issue); *see also Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 650 (1990) (acknowledging a reviewing court need not afford deference to agency interpretation of statute or law it is not charged with administering); *American Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 297 (5th Cir. 1998) (same).

We begin our analysis on the full faith and credit side of the equation. A close look at the Colorado Supreme Court decision reveals the primary issue before that court was the propriety of a permanent injunction enjoining Centennial Express from conducting scheduled air carrier service in and out of Centennial Airport. As such, the Colorado Supreme Court focused from the outset on Centennial Express' conduct in contravention of state regulations. *Arapahoe County Pub. Airport Auth.*, 956 P.2d at 593, 596 (stating that to defer to federal agency jurisdiction would be to "allow future airport users to unilaterally conduct and continue operations in violation of airport rules so long as they implicate federal jurisdiction in some way"). To the extent the Colorado Supreme Court addressed federal preemption issues and the Authority's obligations under the federal grant assurances, it did so in the narrow context of rejecting Centennial Express' defenses. *Id.* at 593-97. Further examination reveals that the court's conclusion the Authority did not violate the terms of the federal grant assurances lacks the depth and breadth of analysis given to those same issues by the Director of the FAA's Office of Airport Safety and Standards, the Hearing Officer, and ultimately, the Final Agency Decision and Order issued by the Associate Administrator for Airports. *Id.* at 596-97.

The credit to be given to the state court opinion is further influenced by the fact the Colorado Supreme Court was seriously divided in this case, as evidenced by its plurality opinion – three of seven justices participated in the majority, one justice concurred, two justices dissented, and one justice abstained. *Id.* at 597. Of particular note here, Justice Scott, while concurring in the result,

considered it "inappropriate" to address preemption in light of the fact the FAA had not yet acted under its authority. *Id.* at 597-98 (Scott, J. concurring). He justified the Colorado Supreme Court's holding based on its inherent authority to "issue an injunction to preserve the status quo pending resolution of the dispute in an appropriate forum." *Id.* at 599. Given Justice Scott's position, and the additional fact the two dissenting justices concluded that "in keeping with the doctrine of primary jurisdiction" the FAA is the appropriate forum to determine issues pertaining to preemption and grant compliance under federal statute, *id.* at 599 (Bender, J. and Martinez, J. dissenting), only half the participating court (three of six) ostensibly precluded the FAA from issuing a contrary ruling.

Last, but certainly not least, the FAA was not a party to, nor in privity with a party to, the state court proceedings. The FAA's interest in fulfilling its statutory responsibility to ensure airport compliance with federal aviation laws and grant assurances, and to protect the public interest, is obviously independent of the interests of any particular air carrier (*e.g.*, Centennial). Mere knowledge of the state court proceedings did not oblige the FAA to participate in those proceedings. *See Martin v. Wilks*, 490 U.S. 755, 762-65 (1989). Without the FAA as a party, the Colorado Supreme Court decision does not satisfy a fundamental requirement of issue preclusion under federal or Colorado law. *See, e.g., Baker v. General Motors Corp.*, 522 U.S. 222, 237 n.11 (1998) ("In no event . . . can issue preclusion be invoked against one who did not participate in the prior adjudication."); *Meredith v. Beech Aircraft*

Corp., 18 F.3d 890, 895 (10th Cir. 1994) ("collateral estoppel fails here simply because [plaintiff] was not a party to the first suit"); *O'Neill v. Simpson*, 958 P.2d 1121, 1123 n.5 (Colo. 1998) (en banc) ("party against whom estoppel is asserted [must have] been a party to or . . . in privity with a party in the prior proceeding"). This, together with the other circumstances discussed above, weighs heavily against extending full faith and credit to *Arapahoe County Public Airport Authority v. Centennial Express Airlines.*[8] *See,*

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[8] The Authority's reliance on *Town of Deerfield v. FCC*, 992 F.2d 420 (2d Cir. 1993), is misplaced. In *Deerfield*, the FCC was not a party in the state or federal court proceedings initiated by Mr. Joseph Carino to challenge municipal zoning regulations prohibiting the installation of a satellite dish in his backyard. Because the FCC did not want to become "a national zoning board," it required complainants like Mr. Carino to pursue other legal remedies before filing administrative complaints. *Id.* at 423. Only after the federal district court gave preclusive effect to the state court ruling in favor of the town, did the FCC "review" the federal district court's decision and issue an order, which, contrary to the federal district court, ruled that FCC regulations preempted the town's zoning regulation. *Id.* at 426. The Second Circuit Court of Appeals held the FCC impermissibly rendered the federal Article III court's decision a mere advisory opinion. *Id.* at 428-30.

The complexion of this case obviously is very different from *Deerfield*. In *Deerfield*, the FCC acted as a disinterested adjudicator to resolve a zoning dispute between two outside parties; the FCC never disputed state or federal jurisdiction over Mr. Carino's lawsuits. In this case, the FAA became an interested party in the administrative proceedings to determine the Authority's compliance with the grant assurances, and never deferred its right to determine compliance issues in the first instance. Moreover, although the FAA issued its decision after the Colorado Supreme Court ruled on the propriety of the permanent injunction against Centennial Express, the agency's

e.g., Acacia Villa v. United States, 24 Cl. Ct. 445, 448 (1991) (acknowledging the doctrine of issue preclusion is "based on a court's exercise of its equitable powers," and "is not mandated in the Constitution or by statute"); *United States v. Kaytso*, 868 F.2d 1020, 1022 (9th Cir. 1989) (stating "[e]ven when the elements of collateral estoppel are present, the decision whether to apply the doctrine is within the [court's] discretion"); *Western Group Nurseries, Inc. v. Pomeranz*, 867 P.2d 12, 15 (Colo. Ct. App. 1993) (ruling collateral estoppel is an equitable doctrine applied at the court's discretion).

Turning to supremacy principles, we reiterate that the issue before the FAA was whether the Authority complied with the conditions imposed on it by federal law and agreement with a federal administrative agency, in return for the Authority's receipt of federal funds. This federal scheme regulating airport grant compliance is "designed in part to insure the maintenance of conditions essential to an efficient national air transport system, including access to airports on a reasonable and non-discriminatory basis." *City & County of San Francisco v. FAA*, 942 F.2d 1391, 1395 (9th Cir. 1991), *cert. denied*, 503 U.S. 983 (1992). On this point, we must agree with the Fifth Circuit that in the arena of aviation regulation "federal concerns are preeminent," and the Department of Transportation, through the FAA, is statutorily mandated to represent those concerns. *American Airlines, Inc.*, 202 F.3d at 800-01. Indeed, it is "difficult to visualize a more

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decision in no way purported to "review, alter, or prevent enforcement of the judgment of an Article III court." *Id.* at 430.

comprehensive scheme of combined regulation, subsidization, and operational participation than that which Congress has provided in the field of aviation." *New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157, 172-73 (1st Cir. 1989) (discussing the FAA's primary role in administering and ensuring compliance with grant assurances) (quotation marks and citation omitted). This certainly tilts the balance toward the application of supremacy principles to protect against state courts trumping the federal interests and concerns embodied within the airport grant program.

As to the potential impact of the Colorado Supreme Court's ruling in *Arapahoe County Public Airport Authority v. Centennial Express Airlines* on federal regulation of the airport grant program, we perceive a direct and significant conflict inasmuch as this and similar state court rulings, if deemed preclusive, would frustrate the FAA's ability to discharge its statutory duty to interpret and implement federal aviation statutes governing the enforcement of grant assurances. *See* 49 U.S.C. § 47122. If given preclusive effect, state court rulings favoring local airport authorities in actions tangentially involving federal grant assurances would further lead to inconsistent enforcement of the federally mandated assurances, potentially jeopardizing the efficiency and equality of access to our Nation's air transportation system. For these reasons, we hold the strong policy of federal supremacy in the field of aviation prevails over full faith and credit principles in this case. The Colorado Supreme Court's decision in *Arapahoe County Public Airport Authority v. Centennial Express Airlines* therefore has no bearing on the FAA decision before us.

Determinations based on Safety and Other Civil Aviation Needs

The Authority argues that as the proprietor of Centennial Airport responsible for local and regional aviation planning, it, and not the FAA, determines whether scheduled passenger service will be prohibited at the Airport as necessary for the safe operation of the airport and to serve the civil aviation needs of the public. In support of this argument, the Authority relies largely on the Colorado Supreme Court's conclusion the ban on scheduled passenger service was, indeed, necessary for the safe operation of Centennial Airport and to serve the public's civil aviation needs. As discussed above, that state court conclusion has no bearing on our decision.

Aside from its reliance on the state court decision, the Authority attempts to retry its case here by convincing us it has good reasons for imposing the ban (including, but not necessarily limited to, the design of and lack of facilities at Centennial Airport; local and regional planning objectives; and the recommendations incorporated in the National Transportation Safety Board's Commuter Airline Safety Study). Our job, however, is not that of fact-finder. We are called on here to review the decision of a federal administrative agency, and we will adhere to the appropriate standards governing such review, as previously articulated in this opinion. *See* 49 U.S.C. § 46110(c); *Wyoming Farm Bureau Fed'n*, 199 F.3d at 1231.

We begin by addressing what we consider the threshold legal issue – whether the Authority is preempted by federal statute from imposing such a ban. The Airline

Deregulation Act of 1978 expressly provides that a political subdivision of a state "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). The Supreme Court has interpreted this provision broadly to preempt all "State enforcement actions having a connection with or reference to airline 'rates, routes, or services.' " *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992) (interpreting 49 U.S.C. § 1305(a)(1), the substantively identical, pre 1994 version of the Airline Deregulation Act preemption provision); *see also American Airlines, Inc. v. Wolens*, 513 U.S. 219, 223 & n.1 (1995). The preemption provision does not, however, prevent a state or political subdivision of a state from carrying out its "proprietary powers," 49 U.S.C. § 41713(b)(3), so long as the exercise of proprietary powers is reasonable, nondiscriminatory, nonburdensome to interstate commerce, and designed not to conflict with the Airline Deregulation Act and its policies. *See* 14 C.F.R. § 399.110(f). The validity of the Authority's ban therefore depends on (1) whether the Authority's ban "is related to a price, route, or service of an air carrier" implicated by 49 U.S.C. § 41713(b)(1); (2) if so, whether the Authority's ban amounts to an exercise of its propriety [sic] powers; and (3) if it is an exercise of proprietary powers, whether such exercise is reasonable, nondiscriminatory, nonburdensome and not in conflict with the Airline Deregulation Act, and thus exempted from preemption by 49 U.S.C. § 41713(b)(3).

We easily conclude the Authority's ban is connected with and relates to both services and routes. *See Morales*, 504 U.S. at 384. By banning scheduled passenger service,

the Authority has affirmatively curtailed an air carrier's business decision to offer a particular service in a particular market. The ban also significantly impacts the scope of services available to public citizens desiring to travel by air from Centennial Airport. We reject any contention that "service" as used in 49 U.S.C. § 41713(b)(1) is not intended to include transportation itself, considering the Airline Deregulation Act's objective to enhance "the availability of a variety of adequate, economic, efficient, and low-priced services," 49 U.S.C. § 40101(4), and to "encourag[e] entry into air transportation markets by new and existing air carriers and the continued strengthening of small air carriers to ensure a more effective and competitive airline industry." 49 U.S.C. § 40101(13); *see also Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995) (en banc) ("Elements of the air carrier service . . . include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself.").

The effect of such a ban further extends to route determinations because the carrier cannot conduct regular operations over any route involving the banned airport. We agree with the FAA that a prohibition on operating over any route is no less a regulation of routes than a restriction on the number of routes a carrier can operate from an airport.

Having determined the Authority's ban on scheduled passenger service constitutes a state regulation of air carrier service and routes, the ban is permissible only if it constitutes an exercise of the Authority's propriety [sic] power. Although the Authority largely evades a direct discussion of the preemption issue in its briefs to this

court, it suggests the scheduled passenger service ban is *per se* an exercise of its propriety [sic] power, because Grant Assurance 22i (patterned after Standard Assurance 22i, *see* 62 Fed. Reg. 29761, 29766 (1997)) permits the Authority to "prohibit or limit any given type, kind or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public." Thus, because the Authority determined "the ban was necessary for the safe operation of Centennial [Airport] and to serve the civil aviation needs of the public," it argues the proprietary powers exception to the statutory preemption provision applies.

"The precise scope of an airport owner's proprietary powers has not been clearly articulated by any court." *American Airlines, Inc.*, 202 F.3d at 806. Courts have, however, "recognized that local proprietors play an extremely limited role in the regulation of aviation." *Id.* (quotation marks and citation omitted). This acknowledgment alone undermines the Authority's apparent assertion that so long as they declare their regulatory action necessary for safety or to satisfy aviation needs, they enjoy carte blanche power. For purposes of this review, however, we will assume, without deciding, that regulatory conduct related to safety and civil aviation needs may fall under the "proprietary powers" umbrella, because under any circumstances, grant assurance language notwithstanding, "[i]n defining the permissible scope of a proprietor's power to regulate under § 14713(b)(3) . . . an airport proprietor can issue only 'reasonable, nonarbitrary, and nondiscriminatory rules that advance the local interest.' " *Id.* (quoting *Western Air Lines v. Port Auth. of New York &*

New Jersey, 658 F.Supp. 952, 958 (S.D.N.Y. 1986)). We therefore proceed to the third and final preemption inquiry.

At this point, we focus on whether the Authority's proclaimed "safety" and "civil aviation needs" justification is reasonable or nonarbitrary. We agree with the FAA this determination is a factual one for which the Authority, as the party asserting the justification, bears the burden of proving before the agency. *See* 14 C.F.R. § 16.229(c). Because of the fact-based nature of this inquiry, we must defer to the FAA's findings (1) the Authority failed to demonstrate the ban is necessary for the safe operation of the airport, and (2) the Authority failed to demonstrate the ban is necessary to satisfy the public's civil aviation needs, so long as those findings are supported by substantial evidence in the record.[9] 49 U.S.C. § 46110(c); *Wyoming Farm Bureau Fed'n*, 199 F.3d at 1231. We conclude they are.

Our careful review of the administrative record confirms a dearth of evidence to support the Authority's claim that the ban on scheduled service is necessary due to ground congestion, operational safety and environmental impact concerns. As noted by the FAA hearing officer, the testimony of individuals representing both the Authority and the City was largely speculative. The

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[9] Although the Authority did not directly challenge the reasonableness of the FAA's findings on economic discrimination and exclusive rights, having carefully reviewed the administrative record, we conclude those findings are supported by substantial evidence, and therefore deem them conclusive.

Authority and City submitted no quantitative analysis of the probable impacts of scheduled passenger airline service at Centennial airport. Conversely, the testimony of Mr. Barry Molar, Manager of FAA's Office of Airport Compliance, and other FAA representatives effectively rebutted the Authority's and City's evidence,[10] demonstrating that the Authority's concerns pertain to impacts that are "largely a function of the total number of operations at the airport," and are not particularized to scheduled passenger service. In other words, the record substantiates the FAA's ruling that "[i]nasmuch as the Authority permits unscheduled passenger services using similar airplanes, flight patterns, making the same amount or more of noise, and does not limit the number

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[10] For example, the Authority relies heavily on a general National Transportation Safety Board (NTSB) recommendation, derived from a Commuter Airline Safety Study (and Quincy Aircraft Accident Report), that scheduled passenger service be permitted only at airports certified pursuant to 14 C.F.R. Part 139. According to the Authority, it is not certified under Part 139 and has no intent to become certified. Moreover, the Authority claims it must rely on off-the-airport and non-exclusive fire protection services, which cannot respond to an airport emergency within three minutes. The Authority further claims it does not have the financial resources to provide exclusive, on-the-airport fire and rescue services.

In rebuttal, the FAA put into evidence proof the NTSB recommendation is a nonbinding recommendation which neither the Authority nor the FAA must follow, and Centennial Airport is not subject to a three-minute fire response time requirement. The FAA also elicited testimony the fire safety concern is no different for scheduled passenger service than it is for unscheduled, charter passenger service. Finally, the FAA demonstrated the Authority imposed the ban on scheduled passenger service prior to publication of the NTSB report.

of operations at the airport," the Authority fails to demonstrate how the ban on scheduled passenger service will alleviate the safety concerns and civil aviation needs the Authority and the City raise.

Because the record supports the FAA's findings that the Authority unreasonably exercised its proprietary powers to ban scheduled passenger service at Centennial Airport, we hold the Authority has exceeded its legitimate scope of power as a state or local government under 49 U.S.C. § 41731(b) and the Supremacy Clause of the United States Constitution. *See* U.S. Const. art. VI, cl. 2. The Authority's ban therefore is preempted by federal law.

Limitations on Scheduled Passenger Service

The Authority and the City assert that even if the ban on scheduled passenger service is unlawful, we should require the FAA to rule that passenger operations at Centennial Airport must be limited to nine-passenger aircraft in light of 1996 legislative amendments requiring airports to have a Part 139 certificate for scheduled passenger operations involving aircraft of more than nine passenger seats. *See* 49 U.S.C. § 44706(a)(2). Centennial Airport does not have such a certificate. Furthermore, the statute provides that the FAA cannot force the Authority to obtain a certificate. *See id.* at § 44706(f).

The FAA concluded it was unnecessary to resolve this issue because (1) the amended statute had not taken effect; and (2) the ban on scheduled passenger service at issue is total, providing no exception for aircraft with nine or fewer passenger seats, as evidenced by the fact

the Authority sought and obtained an injunction against Centennial Express's *six*-passenger aircraft. We likewise decline to resolve this issue as it is not presented by the facts in this case. The Authority does not dispute that its ban on passenger service, as considered by the FAA, is indeed a total ban; nor does the Authority claim it has a pending request to provide service which would justify further consideration of the amended statute.

CONCLUSION

Because we hold (1) the Colorado Supreme Court's decision in *Arapahoe County Public Airport Authority v. Centennial Express Airlines* is not final, preclusive or dispositive of the issues resolved in the FAA's final order; (2) the Authority's ban on scheduled passenger service is preempted by statute and the Supremacy Clause; and (3) the present facts do not warrant prospective consideration of how 49 U.S.C. § 44706, as amended in 1996, might apply, we **DENY** the Authority's Petition for Review and **AFFIRM** the FAA's final Order.

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

CENTENNIAL EXPRESS AIRLINES, GOLDEN EAGLE CHARTERS d/b/a CENTENNIAL EXPRESS AIRLINES	**FAA Order No. 1999-1 (Part 16, Subpart G)**
	Date:
	Docket Nos. 16-98-05, 13-94-03
v.	
ARAPAHOE COUNTY PUBLIC AIRPORT AUTHORITY	
THOMAS KEHMEIER	Docket No. 13-94-25
v.	
ARAPAHOE COUNTY PUBLIC AIRPORT AUTHORITY	
FEDERAL AVIATION ADMINISTRATION	No Separate Docket Number[1]
v.	
ARAPAHOE COUNTY PUBLIC AIRPORT AUTHORITY	

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[1] Under 14 C.F.R. § 16.203(b)(1), the agency became a party when the Director of the FAA Office of Airport Safety and Standards issued his determination providing the Airport Authority the right to a hearing.

FINAL AGENCY DECISION AND ORDER

I. Introduction

The question at the heart of this appeal is the lawfulness of a Federally-assisted airport operator's ban on all scheduled passenger service. At stake is the airport operator's eligibility for additional Federal grants.

II. Background

Arapahoe County Public Airport Authority (the Airport Authority) owns and operates Centennial Airport, which is outside of Denver, Colorado. Over the years, the Airport Authority has received millions of dollars in airport improvement grants from the Federal Aviation Administration (FAA). In exchange for the funds, the Airport Authority signed a grant assurance promising not to grant any person or persons exclusive rights, and another promising to make the airport "available for public use on reasonable conditions and without unjust discrimination." Under the latter assurance, however, the airport operator may "prohibit or limit any given type, kind, or class of aeronautical use . . . if such action [is] necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public."

Beginning in 1985, Centennial Express contacted the Airport Authority about starting scheduled 14 C.F.R. Part 135 passenger service at Centennial Airport. On February 20, 1989, the Airport Authority published the following statement in its newsletter:

> . . . [C]ommercial service has always existed at Centennial in the form of Part 135 charter/air

> taxi certification, which permits "for hire" passenger and freight service, whether *scheduled* or unscheduled *Such activity may not be prohibited* but is limited to aircraft with 30 seats or less.

(Director's Determination at 12; emphasis added.) On October 3, 1989, the Airport Authority's newsletter contained the following statement:

> No scheduled air carrier, either large or small, has applied to the Authority to operate at the airport. Should any apply, the Authority will consider only the smaller, regional air service applications. No action will be taken by the Authority to consider such applications, however, without extensive community input and public hearing.

Id.

On December 12, 1991, Centennial Express sent the Airport Authority a letter asking the Airport Authority to set standards that would allow Centennial Express to operate scheduled passenger service. Centennial Express alleges that the Airport Authority notified Centennial Express that it was revising its airport policy statement and needed to complete the revision before it would enact minimum standards for scheduled passenger service under Part 135.

On March 12, 1992, the Airport Authority adopted a policy statement that stated as follows:

> The Authority reaffirms the original intent of the airport to service the general aviation community. To this end, Centennial will continue to accommodate aircraft operating under Federal

> Aviation Regulations Part 135/Operations Specifications 135 (30 or fewer seats). Requests for scheduled air service shall be reviewed for compliance with this policy, the established weight limit, and the application minimum standards.

(Director's Determination at 13.)

On April 8, 1993, the Airport Authority imposed a moratorium on considering applications for scheduled passenger service. Nevertheless, on May 7, 1993, Centennial Express Airlines (Centennial Express) — having acquired Golden Eagle Charters and its operating certificate, aircraft, and organization — applied to the Airport Authority to conduct scheduled passenger service at Centennial Airport. The Airport Authority did not approve Centennial Express's application. On September 8, 1994, the Airport Authority issued a policy statement banning scheduled passenger service at Centennial Airport.

On December 20, 1994, Centennial Express initiated scheduled passenger service between Centennial Airport and Dalhart, Texas with one six-passenger Beechcraft aircraft.[2] At the time, Centennial Express possessed both Federal safety and Federal economic authority to conduct scheduled passenger service operations at Centennial Airport. Two days later, the Airport Authority obtained a temporary restraining order from the District Court, County of Arapahoe, State of Colorado, prohibiting Centennial Express from providing scheduled service at Centennial Airport. On December 23, 1994, the U.S. Department of Transportation sent the Airport Authority an opinion letter stating that it was arbitrary to exclude a

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[2] FAA Exhibit 1, Item 6.

particular class of service for factors not reasonably related to the impacts of that service. On January 10, 1995, the Airport Authority obtained a permanent injunction from the same court. In January 1995, Centennial Express voluntarily surrendered its Part 135 operating certificate to the FAA.

On August 7, 1994, Thomas Kehmeier, a shareholder of Centennial Express, filed a formal complaint with the FAA, in Docket No. 13-94-25, as a private citizen, alleging that the Airport Authority violated Federal law and its grant assurances by imposing a moratorium on considering applications for scheduled passenger service at Centennial Airport. On January 30, 1995, Centennial Express also filed a formal complaint with the FAA, in Docket No. 13-95-03, alleging that the Airport Authority had improperly prohibited scheduled passenger service at Centennial Airport. Both complaints were filed under 14 C.F.R. Part 13, entitled "FAA Investigative and Enforcement Procedures." 14 C.F.R. Part 13, Subpart D. After the Rules of Practice for Federally-Assisted Airport Proceedings contained in 14 C.F.R. Part 16 went into effect,[3] Centennial Express filed a second complaint under Part 16 on February 23, 1998 (Docket No. 16-98-05). Centennial Express's Part 16 complaint contained the same allegations as its Part 13 complaint. The FAA consolidated the Part 13 dockets and their administrative records into the Part 16 proceeding to avoid duplicative proceedings and to assure that the agency met the Part 16 time requirements for the Part 16 complaint.

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[3] The Rules of Practice contained in Part 16 went into effect on December 16, 1996. 61 Fed. Reg. 53,998 (October 16, 1996).

Meanwhile, Centennial Express was appealing the permanent injunction through the Colorado courts. On December 12, 1996, the Colorado Court of Appeals reversed the permanent injunction granted by the District Court. *Arapahoe County Public Airport Authority v. Centennial Express Airlines, Inc.*, 942 P.2d 1270 (Colo. App. 1996). While the case was on appeal to the Colorado Supreme Court, the state of Colorado dissolved Golden Eagle Charters, the subsidiary of Centennial Express, in May 1997 after Golden Eagle failed to file its 1997 corporate report.

On April 13, 1998, the Colorado Supreme Court ruled that the Court of Appeals erred in reversing the permanent injunction. *Arapahoe County Public Airport Authority v. Centennial Express Airlines, Inc.*, 956 P.2d 587 (Colo. 1997) (en banc). The FAA was not a party to the state court proceedings and did not participate in developing the state court record. The Colorado Supreme Court declined to defer to the FAA's primary jurisdiction. It found that the issue was not Federally preempted under the 49 U.S.C. § 41713(b)(1) provision prohibiting state or local regulation of "price, route or service of an air carrier" but rather fell within the proprietor exception in § 41713(b)(3). The majority also held that the ban did not violate the FAA grant assurance requiring the sponsor to "make its airport available as an airport for public use on fair and reasonable terms without unjust discrimination to all types, kinds, and classes of aeronautical users." Additionally, the majority said that "the authority's ban on scheduled service is necessary to ensure safe operation of the airport" and that "increased congestion is sure to have an impact on safety." *Id.* at 596.

After investigation, the Director of the FAA's Office of Airport Safety and Standards rendered an initial determination on August 21, 1998, under 14 C.F.R. § 16.31 regarding the complaints filed by Centennial Express and Thomas Kehmeier. The Director found that the FAA was not bound by the Colorado Supreme Court's decision. He determined that the Airport Authority violated Federal law and its grant assurances by banning scheduled service at Centennial Airport.

The Airport Authority requested a hearing under 14 C.F.R. Part 16, Subpart F. On September 28, 1998, the Deputy Chief Counsel issued a Hearing Order identifying the parties and issues. Prior to the hearing, Greenwood Village moved to intervene as a party under 14 C.F.R. § 16.207, and the hearing officer granted the motion.

The hearing was held on November 12-13, 1998, in Denver, Colorado. The hearing officer's initial decision affirmed the Director's determination on all issues. The Airport Authority and Greenwood Village have filed the instant appeal of the hearing officer's initial decision.[4]

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[4] Citing 14 C.F.R. § 16.19, the City of Greenwood Village has filed a motion to strike a number of alleged factual misstatements in the reply brief of the FAA Office of Airport Safety and Standards. In response, counsel for the FAA Office of Airport Safety and Standards has filed a document in which it claims that Greenwood's motion was actually an impermissible additional brief that should be stricken.

The FAA Office of Airport Safety and Standards is correct that additional legal argument would be impermissible, because the rules of practice permit only one brief per party. 14 C.F.R. § 16.241(f)(2) ("parties may file one brief on review to the Associate Administrator"). Greenwood's motion, however,

Under the Rules of Practice the Hearing Officer may "issue an initial decision or rule in a party's favor only if the decision or ruling is supported by, and in accordance with, reliable, probative, and substantial evidence contained in the record and is in accordance with law." 14 C.F.R. § 16.227. Otherwise, the Hearing Officer's decision or ruling is subject to reversal. This standard of proof will guide the following discussion of the parties' arguments on appeal.[5]

III. Standing

Greenwood Village argues that the Hearing Officer should have dismissed the complaints because Complainants Centennial Express/Golden Eagle Charters and Thomas Kehmeier lack standing under 14 C.F.R. Part 16. Greenwood points out that Centennial Express no longer holds a Part 135 air carrier certificate and Golden Eagle Charters has been dissolved. As for Kehmeier, Greenwood argues that he can no longer benefit from scheduled service at Centennial Airport because he has moved away from Denver. Greenwood contends that as a shareholder of Centennial Express, Kehmeier is simply a proxy for Centennial Express and thus he lacks standing just as Centennial Express does.[6]

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briefly lists alleged factual misstatements. Thus, it does not constitute an improper additional brief and it has been considered in reaching this decision.

[5] Any arguments not specifically addressed have been considered and found to be without merit.

[6] Greenwood has several additional arguments relating to standing. Greenwood argues that the Hearing Officer erred in

At the outset, it should be noted that standing requirements in administrative adjudications are less strict than in Federal court actions. As the court stated in *ECEE, Inc. v. Federal Energy Regulatory Commission,* 645 F.2d 339, 349 (5th Cir. 1981):

> Administrative adjudications . . . are not . . . article III proceeding[s] to which either the "case or controversy" or prudential standing requirements apply; within their legislative mandates, agencies are free to hear actions brought by parties who might be without standing if the same issues happened to be before a federal court. *Gardner v. FCC,* 530 F.2d 1086, 1090-91 (D.C. Cir. 1976). *Accord, Koniag, Inc., Village of Uyak v. Andrus,* 580 F.2d 601, 611-17 (D.C. Cir.) (Bazelon, J., concurring), *cert. denied,* 439 U.S. 1052 (1978).

The Rules of Practice for Federally-Assisted Airport Enforcement Proceedings in 14 C.F.R. Part 16 provide that "[a] person directly and substantially affected by any alleged non-compliance may file a complaint with the Administrator." 14 C.F.R. § 16.23(a). Assuming, *arguendo,*

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suggesting that the Part 13, Subpart D complaints could cure the lack of standing under Part 16, and that it is unfair for the agency to apply only the sections of Part 16 that favor the agency. Moreover, Greenwood believes that the Hearing Officer erred in reasoning that because the FAA could have brought its own case under 14 C.F.R. § 16.101, it is irrelevant whether these particular Complainants lack standing. According to Greenwood, the agency chose not to bring a case of its own, and even if had it done so, it could not have based it on a live controversy, because there is currently no Part 135-certificated carrier seeking to offer scheduled service at Centennial Airport.

that the standing requirement of Part 16 applies,[7] it is difficult to imagine a stronger case for a direct and substantial effect on Complainants. The Airport Authority obtained an injunction that immediately brought Centennial Express's scheduled passenger operations at Centennial Airport to a halt, forcing it out of business there. Kehmeier is a shareholder of Centennial Express and therefore is directly and substantially affected by any prohibition on Centennial Express's revenue operations. The very facts that Greenwood points to — the surrender of the Part 135 certificate and the dissolution of Golden Eagle Charters — are perhaps the most compelling evidence possible that the Airport Authority's alleged noncompliance had a direct and substantial effect on Complainants.[8] As Kenneth Culp Davis states in § 24.1 of the

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[7] Arguably, the less stringent standing requirements of Part 13, Subpart D apply because Centennial Express and Thomas Kehmeier filed their complaints under Part 13, Subpart D before Part 16 came into existence. (Part 16 applies to complaints filed and investigation initiated by the FAA on or after December 16, 1996. 14 C.F.R. § 16.1(d). For complaints filed earlier, Part 13, Subpart D continues to apply.)

Part 13, Subpart D permits any person to file a complaint with the Administrator with respect to anything done or omitted to be done by any person in contravention of any provision of any Act or any regulation or order issued under it, as to matters within the jurisdiction of the Administrator. 14 C.F.R. § 13.5. For the agency to apply the stricter Part 16 rules for standing and pleading to the complaints already accepted and pleaded under more lenient rules in Part 13, Subpart D arguably would have violated Complainants' due process rights.

[8] Section 16.23(a) does not state that the person directly and substantially affected must hold a Part 135 certificate. Note that the Airport Authority has admitted that it has the discretion to

Administrative Law Treatise (2nd ed. 1983), "A main objective in reforming the law of standing should be to strip down the law to one simple proposition: one who is adversely affected in fact should never be denied standing."[9]

Even if Complainants lacked standing, dismissal of the proceeding would be inappropriate at this point because the FAA, with its statutory mandate to ensure that Federally-funded airports comply with their grant assurances, would remain as party and as prosecutor. The FAA became a party after the Director of the FAA's Office

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consider an application for scheduled passenger service even where the applicant does not possess an FAA operating certificate at the time of application. Exhibit 20e.

[9] Greenwood argues that the Airport Authority's ban on scheduled passenger service caused neither the surrender of Centennial Express's Part 135 certificate nor the dissolution of Golden Eagle Charters. It is hard to believe that no causal connection exists, given the timing of the surrender (immediately after the Airport Authority obtained an injunction again [sic] Centennial Express's scheduled operation). Centennial Express went to some trouble to set up scheduled operations at Centennial Airport. The injunction the Airport Authority obtained halting Centennial Express/Golden Eagle Charters' scheduled passenger operations certainly would not have helped the financial situation of Centennial Express and Golden Eagle Charters.

Regardless, even if there was no causal connection between the ban on the one hand and the surrender of the operating certificate and dissolution of Golden Eagle Charters on the other, the ban still had a direct and substantial effect on Centennial Express – Centennial Express/Golden Eagle Charters sought to operate scheduled passenger service at Centennial Airport, but the Airport Authority obtained an injunction stopping it from doing so.

of Airport Safety and Standards issued his initial determination finding the Airport Authority in violation of Federal law and its grant assurances and the Airport Authority requested a hearing. The Rules of Practice provide that: "The parties to the hearing are the respondent(s) named in the hearing order, the complainant(s), and the *agency*."[10] 14 C.F.R. § 16.203(b)(1) (emphasis added). They further provide, in relevant part, that, "the agency attorney will serve as prosecutor for the agency from the date of issuance of the Director's determination providing an opportunity for hearing." 14 C.F.R. § 16.203(b)(2) (emphasis added). In accordance with these provisions, the Hearing Order named the FAA Office of Airport Safety and Standards as a separate party, "as prosecutor *for the agency*." (Emphasis added.) *See also* 14 C.F.R. § 16.3, which defines "agency attorney" as an attorney "who represents the FAA during the investigation of a complaint or at a hearing on a complaint, and who prosecutes on behalf *of the FAA* . . . . "

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[10] The FAA Office of Safety and Standards has indicated in its reply brief that if the complaints were dismissed, the Director would begin an investigation under 14 C.F.R. § 16.101. The FAA does not need a "live" complainant to initiate an investigation. Notice and the opportunity for informal resolution under Section 16.101 at this point would be pro forma. The Airport Authority has had ample notice of the FAA's position, and the Airport Authority's refusal to comply with its grant assurances after an FAA investigation and several decisions does not suggest an interest in informal resolution. Under the circumstances, complaint dismissal would be wasteful of agency and taxpayer resources.

Thus, the role of the FAA Office of Airport Safety and Standards is not to represent Complainants, but to represent the agency, acting to protect the public interest. The role of the private complainant is simply to bring to the agency's attention apparent violations of airport grant assurances. *See* 61 Fed. Reg. at 53,999 (October 16, 1996), noting that the FAA is the party with the burden of proof and that the Rules of Practice give Complainants party status only to assist the FAA in the development of the factual record.

In summary, Complainants Centennial Express and Thomas Kehmeier have standing because the Airport Authority's ban on scheduled passenger service substantially and directly affected them. In addition, the FAA has standing by operation of the rules.[11]

IV. Mootness

As for the Airport Authority's and Greenwood's argument that this proceeding is moot, it is undisputed that the ban on scheduled passenger service continues in

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[11] While Greenwood claims that the FAA intentionally destroyed evidence "highly relevant" to its standing claim – *i.e.*, the Part 135 operator file for Centennial Express/Golden Eagle Charters – the record indicates that the local FAA Flight Standards District Office destroyed the file along with other inactive files several years ago when moving FAA Denver-based field offices to the new Denver International Airport. In any event, Greenwood has not shown how the Part 135 file is relevant to this proceeding.

place at Centennial Airport.[12] Thus, this case presents a live controversy because the FAA, as a party, has a genuine interest in enforcing the applicable Federal statutory provisions and grant assurances.[13]

V. Due Process

Under the Rules of Practice in Part 16, a Hearing Officer rather than an Administrative Law Judge presides over the hearing. (*See, e.g.*, 14 C.F.R. § 16.202, detailing the powers of the Hearing Officer, which include presiding over the hearing and issuing an initial decision.) Greenwood argues that the FAA Deputy Chief Counsel violated its due process rights by declining to amend the hearing order to include the issue of whether the Hearing Officer should have referred the case to an Administrative Law Judge for a hearing under the Administrative Procedure Act (APA).

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[12] To support its mootness argument, Greenwood states that there are currently no Part 135-certificated carriers seeking to offer scheduled service at Centennial Airport. Assuming, *arguendo*, that Greenwood's representation is still accurate, these proceedings are not moot because the Airport Authority has conceded that one need not have a Part 135 certificate at time of application. In addition, the Airport Authority's ban would likely discourage potential carriers from applying to operate scheduled service.

[13] Also, because the mootness doctrine arises from the case or controversy requirement for Article III courts, it does not necessarily apply to proceedings before Article I executive branch administrative proceedings.

Greenwood's Standing to Raise Issues

In this proceeding, the Director withheld approval of the Airport Authority's new grants – not Greenwood's. Greenwood is merely an intervenor.[14] Under 49 U.S.C. § 47106(d), the statute under which the Director's Determination withheld approval of new grants, only the Airport Authority, as the airport sponsor, may request a hearing. Significantly, the Airport Authority, the only respondent with the statutory right to a hearing, has not argued that an Administrative Law Judge rather than the Hearing Officer should have heard its case.

Greenwood, having no right to request a hearing, is outside the "zone of interests" protected by 49 U.S.C. § 47106(d). *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987). As a result, Greenwood is without standing to raise the issue of who should have heard this case.

Inapplicability of APA

Even if the Airport Authority, rather than Greenwood, had raised the same argument – *i.e.*, that the APA requires that an administrative law judge hear this case – it would still fail. Greenwood argues as follows:

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[14] The section in the Rules of Practice regarding intervention provides that "Participation under this section is at the discretion of the FAA, and no decision permitting participation shall be deemed to constitute an expression by the FAA that the participant has such a substantial interest in the proceeding as would entitle it to judicial review of such decision." 14 C.F.R. § 16.207(d).

> . . . the Hearing Officer did not satisfy the APA's separation of functions doctrine because he is an FAA attorney in the Procurement Legal Division of the Office of the Chief Counsel. The Office of the Chief Counsel is responsible, *inter alia*, for investigations and enforcement actions by the FAA. The Hearing Officer, therefore, was conspicuously under the supervision and direction of an agency employee who is engaged in the performance of investigative or prosecuting functions for the agency. Since the Hearing Officer and FAA investigators are responsible to the FAA Administrator through the same chain of authority (the Chief Counsel), the Hearing Officer's role as adjudicator in this case violated the APA.

(Appeal Brief at 33.)

The APA, however, does not apply to hearings provided under 49 U.S.C. §§ 47106(d) & 47111(d).[15]

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[15] The wording of 49 U.S.C. § 47106(d) indicates that Congress did not intend to require full agency adherence to all APA Section 554 components. Unlike another part of the same statute (the Airport and Airway Improvement Act of 1982, as amended) which *is* subject to the APA and which expressly requires a hearing before an administrative law judge under 14 C.F.R. Part 302 [*see* 49 U.S.C. 47129(c)], 49 U.S.C. § 47106(d) only requires "an opportunity for a hearing." Section 554 of the APA does not apply where the statute, rather than requiring a hearing *on the record*, simply requires an opportunity for a hearing without more. *Friends of the Earth v. EPA*, 966 F.2d 690, 6593 (D.C. Cir. 1992); *St. Louis Fuel and Supply Co. v. FERC*, 890 F.2d 446, 448 (D.C. Cir. 1989).

Part 16's Separation of Functions Provision

Although the APA does not apply, to ensure the integrity of the decisionmaking process, the Rules of Practice in 14 C.F.R. Part 16 include a provision separating investigative/prosecutorial functions from adjudicative/decisionmaking functions. *See* 14 C.F.R. § 16.5(b), providing that an agency employee who investigates or prosecutes will not advise or communicate substantively about the case with the hearing officer or the Associate Administrator regarding their respective decisions (except as counsel or witness in public proceedings).[16]

Contrary to Greenwood's argument, the Chief Counsel is not an investigator/prosecutor under the Rules of Practice in Part 16. Instead, the Chief Counsel advises the Associate Administrator, who issues the agency's final decision in Part 16 cases. *See* 14 C.F.R. § 16.5(c), stating that "[t]he Chief Counsel . . . advises the Associate Administrator . . . regarding any case brought under this part." Thus, the Chief Counsel's function in Part 16 cases is adjudicative, not investigative or prosecutorial.

The only attorneys who investigate and prosecute Part 16 cases are "agency attorneys." *See* 14 C.F.R. § 16.5, providing that "[p]roceedings under this part . . . will be prosecuted by an agency attorney." The Rules of Practice

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[16] As the FAA explained in the Notice of Proposed Rulemaking for 14 C.F.R. Part 16: "Separation of functions is not required by statute because hearings under part 16 would not be subject to APA hearing requirements; however, the separation is provided to promote confidence in the impartiality and integrity of decisions under the new procedures." 59 Fed. Reg. 29,880, 29,883 (June 9, 1994).

specifically define "agency attorney" to exclude the Chief Counsel. *See* 14 C.F.R. § 16.3, providing that "an agency attorney shall not include the Chief Counsel . . . . " The record contains no evidence that any agency employee violated Section 16.5(b). The Hearing Officer was completely independent of the Chief Counsel in all matters pertaining to this case from the date of his appointment until he issued his initial decision.

VI. Collateral Estoppel

Both the Airport Authority and Greenwood argue that the Hearing Officer erred in failing to find that the FAA must extend full faith and credit to the Colorado Supreme Court's decision.[17] They argue that collateral estoppel bars relitigation of the issues in the instant proceeding.

Collateral estoppel, or issue preclusion, is the branch of the res judicata doctrine that prevents a party from relitigating an issue of fact or law that has been decided in an earlier suit. *Wilder v. EPA*, 854 F.2d 605, 616 (2d Cir. 1988). Section 1738 of 28 U.S.C. requires Federal courts to give effect to the collateral estoppel rules of the state that rendered a prior judgment where the same issues are raised later in a Federal proceeding. *Id.* Section 1738 of 28

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[17] The Colorado Supreme Court upheld the State District Court's injunction on Centennial Express's scheduled passenger operations at Centennial Airport. The court held that Federal law does not preempt the Airport Authority's ban on scheduled passenger service. It also held that the ban is necessary for the safe operation of the airport and that it serves the civil aviation needs of the public.

U.S.C. directs that judicial proceedings of the court of any State "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." Federal administrative agencies as well as courts must adhere to 28 U.S.C. § 1738. *Midgett v. United States*, 221 Ct. Cl. 171, 189 (1979).

To accord full faith and credit to a given state-court judgment, a Federal court or administrative agency must give a prior state-court judgment "the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Town of Deerfield v. FCC*, 992 F.2d 420, 428 (2nd Cir. 1993), quoting *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 81 (1984). *See also American Mannex Corp. v. Rozands*, 462 F.2d 688, 690 (5th Cir. 1972) (stating that "[u]nder 28 U.S.C. § 1738, the Federal court follows the state rule of repose"). Thus, Colorado's rules relating to collateral estoppel bear examination.

Colorado's Estoppel Requirements Unmet

Colorado's highest court has held as follows:

> Collateral estoppel, or issue preclusion, bars relitigation of an issue determined in a prior proceeding if: (1) the issue precluded is identical to an issue actually determined in the prior proceeding; (2) the party against whom estoppel is asserted has been a party to or is in privity with a party in the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted has had a full and fair

> opportunity to litigate the issue in the prior proceeding.

O'Neill v. Simpson, 958 P.2d 1121 (Colo. 1998).

In the instant case, several of the above-listed requirements under Colorado law for collateral estoppel are unmet. First, the Airport Authority and Greenwood have attempted to assert estoppel not just against Centennial Express and Thomas Kehmeier, but also against the FAA.[18] The FAA, however, was not a party to, nor was it in privity with a party to, the prior proceeding.[19] As a result, the FAA did not have a full and fair opportunity to litigate the issues in the prior proceeding.[20]

While the Airport Authority and Greenwood argue on appeal that *Town of Deerfield v. FCC*, 992 F.2d 420 (2d

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[18] For a discussion of the agency's role as party to the proceeding under the regulations, *see supra* p. 9.

[19] Arguably, neither was Thomas Kehmeier. Kehmeier was not a party to the prior proceeding and under Colorado law, he may not have been in privity with any party, even though he was a shareholder of Centennial Express, which was a party to the prior proceeding. In *Falkenberg v. Sternberg*, 388 P. 2d 771 (Colo. 1964), the Colorado Supreme Court held that a corporate president who owned 98% of the corporate stock was not precluded from asserting a claim in his individual capacity against an architect even though a similar claim by the corporation had been dismissed in a prior proceeding. *See also Foley Custom Homes v. Flater*, 888 P.2d 383, 364 (Ct. App. 1994), *citing Falkenberg v. Sternberg*, 388 P. 2d 771 (Colo. 1964) and holding that Foley Custom Homes, a closely held corporation, and Daniel Foley, who owned 50% of the company's stock, were not in privity.

[20] The FAA simply does not have the resources to intervene in the innumerable state court proceedings in which aviation issues arise.

Cir. 1993) supports their argument that collateral estoppel applies, *Deerfield* is distinguishable. In *Deerfield*, in the proceeding before the FCC, the party against whom estoppel was sought (an individual named Joseph Carino) had been a party to the prior proceedings in both state and Federal court. The FCC was not a party to either the prior proceedings in state or Federal court, or to the proceedings before the FCC. Thus, in *Deerfield*, the collateral estoppel requirement under Colorado law of identity of parties was met, whereas the requirement is not met in the instant case.[21]

Second, even if collateral estoppel applied to some of the issues in the instant proceeding, it would still not apply to all of them. The Colorado Supreme Court did not decide all of the issues in the instant proceeding. A close examination of the court's opinion reveals that it did not decide whether the Airport Authority violated Federal law relating to the granting of exclusive rights, which forms the basis for two of the six independent findings in the Director's Determination.

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[21] *Deerfield* is also distinguishable because the FCC issued an order that conflicted with that of a Federal Article III court. Under the Constitution, Federal Article III courts may decide only "Cases" or "Controversies." U.S. Const. Art. III, § 2, cl. 1. They are not permitted to render advisory opinions. *Deerfield*, 992 F.2d at 427. The U.S. Court of Appeals for the Second Circuit held that the FCC, by issuing a decision that conflicted with that of a Federal District Court, had improperly attempted to render a Federal Article III court's decision a mere advisory opinion. *Id.* at 428-29.

In contrast, in the instant case, a Federal Article III court has never decided any of the issues.

Supremacy Clause Trumps 28 U.S.C. § 1728

In any event, 28 U.S.C. § 1728, which directs that Federal courts and agencies must give state court judgments full faith and credit, is limited by the Supremacy Clause of the U.S. Constitution. *Midgett*, 221 Ct. Cl. at 189. Federal courts will not give effect to a judgment or decree of a state court that would restrain the exercise of sovereign power of the United States by imposing requirements that are contrary to important and established Federal policy. *Id.*, citing *Byrd v. Blue Ridge Cooperative*, 356 U.S. 525 (1957); *Red Fox v. Red Fox*, 564 F.2d 361, 365 n.3 (9th Cir. 1977); *American Mannex Co. v. Rozands*, 462 F.2d 688, 690 (5th Cir.), *cert. denied*, 409 U.S. 1040 (1972).[22]

The Colorado Supreme Court's decision restrained the sovereign power of the United States by upholding and imposing a ban by a state authority on scheduled passenger flights at a Federally-funded airport. The ban violates Congress' express prohibition, in 49 U.S.C. § 41713(b)(1), on state and local regulation of air carrier rates, routes, or services. In the Airline Deregulation Act, Congress preempted state and local regulation of rates, routes, or services of air carriers to ensure that the states would not undo Federal deregulation of domestic air transport. *Morales v. TWA*, 504 U.S. 374, 378-379 (1992). The Airport Authority's ban on scheduled service is inconsistent with the Airline Deregulation Act's goals of

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[22] Even under Colorado law, collateral estoppel is an equitable doctrine and need not be applied in every case. *Western Group Nurseries v. Pomeranz*, 867 P. 2d 12, 15 (Ct. App. Colo. 1993).

furthering "the availability of variety of adequate, economic, low-priced services without unreasonable discrimination" (49 U.S.C. § 40101(4)), and "encouraging entry into air transportation markets by new and existing air carriers and the continued strengthening of small air carriers to ensure a more effective and competitive airline industry" (49 U.S.C. § 40101(13)).

A safe and efficient system of public use airports cannot be maintained if each Federally-funded airport is free to impose its own ban on certain types of air service without an adequate basis in fact or law. The national system would weaken and balkanize. *See New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157, 172 (1st Cir. 1989), referring to the "[b]alkanizing forces of state and local regulation," and stating that in reducing Federal economic regulation of aviation, Congress did not intend to leave a vacuum for state and local governments to fill.

VII. Burden of Proof

According to Greenwood, the Hearing Officer erred in finding that the Airport Authority and Greenwood bore the burden of proving that a ban on scheduled passenger operations was necessary for the safe operation of the airport. Instead, Greenwood argues, the Hearing Officer should have required the FAA to show that the Director's Determination (finding unlawful the Airport Authority's ban on scheduled passenger service) would "enhance safety and security" in air commerce in the Denver region. To support its argument, Greenwood cites 49 U.S.C. § 40101(d), which provides as follows:

§ 40101. Policy

. . .

(d) Safety Considerations in Public Interest. – In carrying out subpart III of this part [49 U.S.C. §§ 44101 – 45304, entitled "Safety"] and those provisions of subpart IV [49 U.S.C. §§ 46101 – 46507, entitled "Enforcement and Penalties"] applicable in carrying out subpart III, the Administrator shall consider the following matters, among others, as being in the public interest:

(1) assigning, maintaining, and enhancing safety and security as the highest priorities in air commerce.

49 U.S.C. § 40101(d).

Section 40101 of Title 49 does not apply. First, it does not deal with the issue of the proper allocation of the burden of proof. Second, it expressly applies only to subpart 111 (49 U.S.C. §§ 44101 – 45304) and subpart IV (49 U.S.C. §§ 46101 – 46507), whereas the authority for the instant proceeding (the statute under which the Director's Determination withheld approval of new grants) is 49 U.S.C. § 47106(d). The Airport Authority allegedly violated 49 U.S.C. § 47107(a)(1) regarding economic discrimination; 49 U.S.C. §§ 47107(a)(4) and 40103(e), regarding exclusive rights; and 49 U.S.C. § 41713(b)(1), regarding Federal preemption of state regulation of air carrier prices, routes, and services. None of these provisions are found in subparts III and IV.

The allocation of the burden of proof in these proceedings is set by 14 C.F.R. § 16.229. Under Section

16.229, the agency has the burden of proving noncompliance with Federal law and the grant assurances, but a party who asserts an affirmative defense has the burden of proving the affirmative defense. 14 C.F.R. § 16.229(a) & (b).

The following facts are undisputed:

- As a precondition for receiving Federal funds, the Airport Authority agreed to make the airport available for public use on reasonable conditions and not to discriminate unjustly.
- When the Airport Authority accepted Federal funds, no ban on scheduled passenger service existed.
- After the Airport Authority had accepted millions of dollars in Federal funds, it imposed the ban.
- The Airport Authority's ban leaves the airport unavailable for a certain type of public use – specifically, scheduled passenger service. The ban also discriminates between scheduled and unscheduled passenger service.

The Airport Authority's defense in this proceeding has been that its discrimination against scheduled passenger service is justified. It argues that the grant assurance regarding non-discrimination expressly permits the airport sponsor to "prohibit . . . any type, kind, or class of aeronautical use at the airport if . . . necessary for the safe operation of the airport or . . . to serve the civil aviation needs of the public."

In determining what constitutes an affirmative defense, fairness and convenience are relevant considerations. WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL 2D § 1271. Thus, if all or most of the relevant information is within the control of the defending party, then fairness and convenience suggest that the matter should be considered an affirmative defense. *Id.* In the instant case, the Airport Authority determined that safety and the civil aviation needs of the public required its ban on scheduled passenger service. The Airport Authority is in the best position to provide the evidence on which it based its safety and public needs determination.

Another relevant consideration in determining whether a matter constitutes an affirmative defense is whether the party bringing the action will be taken by surprise by the assertion of the defense at the trial or hearing if the defense is not pleaded affirmatively. *Id.* This consideration also supports the Hearing Officer's determination that safety constituted an affirmative defense. In the instant case, the agency and complainants would have been taken by surprise if the Airport Authority had not affirmatively pleaded the "safe operation and public civil aviation needs" defense in its answer.

For these reasons, the Hearing Officer did not err in ruling that the Airport Authority's justifications for discrimination constitute affirmative defenses which the Airport Authority had the burden of proving.

XIII. Reasonableness of Justifications for Ban

A. Safe Operation of the Airport

The Airport Authority and Greenwood claim that the ban on scheduled passenger service is necessary for the safe operation of the aircraft. To support their claim, they argue as follows:

- Centennial Airport lacks a terminal, baggage claims system, and passenger security system.
- There was testimony at the hearing that it is a safety problem to mix different types of aircraft in the same airspace environment.
- The National Transportation Safety Board (NTSB) has recommended, as a class 2 priority action,[23] that the FAA seek legislative action limiting scheduled passenger service to airports holding Part 139 certificates[24] and Centennial Airport lacks a Part 139 certificate.
- The local fire department chief testified that his personnel could not respond to fires at Centennial Airport within 3 minutes, and therefore, the chance of survivable crash victims was nearly zero.

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[23] Tr. 599.

[24] 14 C.F.R. Part 139 contains the rules governing the certification and operation of land airports that serve any scheduled or unscheduled passenger operations of air carriers that are conducted with aircraft having a seating capacity of more than 30 passengers. 14 C.F.R. § 139.1.

- Scheduled passenger service would require changes to Centennial Airport's infrastructure to maintain crowd control.

There are a number of matters that undercut the Airport Authority's arguments that safety requires the ban. First, the Airport Authority has failed adequately to explain how a terminal and baggage system are necessary for passenger safety. The connection is unclear.[25] As for a passenger security system, the FAA introduced into the record evidence that there is no legal requirement for security screening for the type of operation Centennial Express proposed.[26]

Second, while the Airport Authority has banned all scheduled passenger operations, it permits the same sizes and types of aircraft to carry passengers in unscheduled operations.[27] Thus, the testimony at the hearing that it is

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[25] A county commissioner testified at the hearing that a terminal was needed to protect passengers from hail storms. Tr. 97. He admitted, however, that Centennial Express had obtained, through a sublease, facilities through which to process passengers. Tr. 99. The commissioner was unable to offer any explanation as to how the lack of a baggage system presented a safety problem, though previously he had signed an affidavit stating that it did. Tr. 103.

[26] Tr. 105-07. The FAA's expert in aviation security testified that the size of the aircraft determines whether FAA regulations require screening. Tr. 426. Even when screening is required, the air carrier rather than the airport operator ordinarily provides for it. Tr. 430.

[27] The airport already has weight limits for its runways that would keep out aircraft that are too large to operate safely at the airport. Tr. 90. In any event, FAA regulations prohibit aircraft with a seating capacity of more than 30 passengers – scheduled

a safety problem to mix different types of aircraft in the same airspace, even if accurate, is inapplicable. Furthermore, the fire department response time is no different for passengers in unscheduled operations than it is for passengers in scheduled operations.[28] If the scheduled passenger operations using the same types of aircraft are unsafe, then how can the Airport Authority consider the unscheduled passenger operations safe, given that the only difference in the operations is whether the flights are scheduled?[29] Also, all operations at the airport, whether scheduled or unscheduled, would be conducted by pilots tested and licensed by the FAA, would use aircraft certificated by the FAA for airworthiness, would follow FAA operating rules, and would follow the direction of FAA air traffic controllers.

Third, if the Airport Authority's concern was that a high level of operations was causing congestion in the air or on the runways, affecting safety, then the Airport Authority should have attempted more narrowly focused alternatives first. The Airport Authority, however, admitted in its answers to interrogatories that congestion,

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or unscheduled – from operating at Centennial Airport, because the airport lacks a Part 139 certificate. 14 C.F.R. § 139.101. *See also* Tr. 229-30.

[28] The fire station is located about a mile and a half from the airport runways. Tr. 493.

[29] At the hearing, the Mayor of Greenwood was asked the following question: "There is nothing inherently more unsafe about the fact that a Beechcraft King Air is flying over your homes and schools on a scheduled basis as opposed to an unscheduled basis, is there?" His reply was no. Tr. 232. *See also* Tr. 417 (another witness to the same effect).

capacity, and environmental effects were not among the reasons for its ban on scheduled passenger service.[30]

Fourth, the record does not support Greenwood Village's argument that crowd control would be a problem. The Airport Authority banned Centennial Express's operation with a single six-passenger aircraft. It is difficult to believe that a scheduled operation using one six-passenger aircraft could cause crowd control problems.

As for the NTSB recommendation, the Airport Authority's claim that the NTSB recommendation formed the basis for the ban lacks credibility, given that the NTSB issued its recommendation *after* the Airport Authority banned scheduled operations. Thus, the Airport Authority's claim bears all the hallmarks of a *post hoc* rationalization.[31] Moreover, the NTSB recommendation was only a *recommendation*. The FAA's statutory duty is to decide if the recommendation should be implemented, either in its original or in a modified form. The FAA is not required to follow NTSB recommendations.[32]

For these reasons, the Airport Authority has failed to bear its burden of proving that the safe operation of the airport requires the ban.

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[30] Tr. 119-20.

[31] Note too that numerous airports in the region, as well as in the country as a whole, permit scheduled passenger service at predominantly general aviation airports without a Part 139 certificate. Tr. 111.

[32] Tr. 599.

B. Civil Aviation Needs of the Public

The Airport Authority and Greenwood claim that the ban on scheduled passenger service is necessary to serve the civil aviation needs of the public. They argue that permitting scheduled passenger service would conflict with Centennial Airport's designation as a general aviation reliever airport, and that the FAA should defer to regional and local planning.

Although Centennial Airport's primary function may be to serve general aviation, it does not logically follow that any level of scheduled Part 135 service is inconsistent with that primary function. The initiation of scheduled passenger service at Centennial Airport is unlikely to change the predominately general aviation role of the airport.[33] The claim that permitting both scheduled and unscheduled passenger operations would alter the character of the airport is speculative.[34] There have been no

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[33] The term "general aviation" does not have one generally accepted meaning. In some FAA definitions, "general aviation" does not include any air carriers, whether scheduled or unscheduled. Nevertheless, a county commissioner conceded at the hearing that the Airport Authority permits "a lot" of unscheduled air carriers to operate at Centennial Airport. Tr. 122. The commissioner also conceded that the Airport Authority has taken no significant actions to limit overall growth at the airport other than to ban Centennial Express's operation. For example, in the past year, it signed a 40-year lease plus an option to extend for 50 more years with a development company that plans on spending at least $3 million on infrastructure for a third fixed base operation on the airport. Tr. 122-23.

[34] Note that there was testimony at the hearing that Centennial Express's proposed operations would have had an

studies suggesting that scheduled passenger service would reduce general aviation use of the airport.[35] In the unlikely event that scheduled passenger service ever undermined the airport's reliever role, there were reasonable and nondiscriminatory restrictions short of a total ban which could have been attempted first. The Airport Authority admitted in its answers to interrogatories that it did not consider any of these alternatives to meet the civil aviation needs of the public before imposing the ban.[36] In fact, the Denver Regional Aviation System Plan itself recognizes that an airport may be required by its grant obligations to accept service that is inconsistent with its primary purpose. The Airport Authority and Greenwood do not dispute the Hearing Officer's factual finding that prior to 1993, the Airport Authority's policies permitted scheduled passengers [sic] service at Centennial Airport, notwithstanding its general aviation designation in regional planning documents.

If anything, the civil aviation needs of the public *support* the opposite policy – permitting scheduled service as well as unscheduled service at Centennial Airport. If the public does not want or need scheduled passenger service at Centennial Airport, market forces will lead to that result. The ban is both unnecessary and unlawful.

"insignificant" impact on the operations at Centennial Airport. *See, e.g.*, Tr. 496.

[35] Tr. 251.

[36] *See also* Tr. 118-19.

Multi-Airport Proprietor Rule

Congress made the receipt of Federal funds contingent upon an airport owner's agreement to make the airport available for public use and without unjust discrimination. As a result, a Federally-funded airport may not ordinarily ban a whole class of service. In light of case law, however, the FAA has carved out the following exception to the general rule. This exception is referred to as the multi-airport proprietor rule. It provides as follows:

> Where the volume of air traffic is approaching or exceeding the maximum practical capacity of an airport, an airport owner may designate a certain airport in a multiple airport system under the same ownership and servicing the same community for use by a particular class or classes of aircraft. The owner must be in a position to assure that all classes of aeronautical needs can be fully accommodated within the system of airports under the owner's control and without unreasonable penalties to any class and that the restriction is fully supportable as being beneficial to overall aviation system capacity.

FAA Order No. 5190.6A.

The Airport Authority and Greenwood take issue with the FAA's multi-airport proprietor rule. They argue that there is no valid distinction between multiple airports controlled by the same owner, and multiple airports acting under a plan devised by a regional planning organization. However, the Airport Authority has failed to show that air traffic at Centennial Airport is approaching

or exceeding the maximum practical capacity. For example, in its answers to interrogatories, the Airport Authority conceded that capacity was not a basis for the ban on scheduled passenger service.[37] Thus, it is unnecessary to reach the issue of whether the Airport Authority has met the other requirements of the multi-airport proprietor rule.

For all of the reasons noted above, the Airport Authority has failed to bear its burden of proving that the civil aviation needs of the public require the ban.

IX. Proprietary Powers

The Hearing Officer determined that the Airport Authority's ban on scheduled passenger service violated the Federal statute that preempts state and local regulation of air carrier prices, routes, and service.[38] He rejected the Airport Authority's claim that the ban falls within the "proprietary powers" exception to the statute.[39] The Airport Authority and Greenwood argue on appeal that he erred in so doing.

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[37] *See also* Tr. 129, 250, 414.

[38] 49 U.S.C. § 41713(b)(1) provides, in relevant part, that "a State [or] political subdivision of a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air carrier transportation. . . . "

[39] 49 U.S.C. § 41713(b)(3) provides, in relevant part, as follows: "This subsection does not limit a State [or] political subdivision of a State . . . that owns or operates an airport . . . from carrying out its proprietary powers and rights."

The Airport Authority argues in its appeal brief that the ban falls within the "proprietary powers" exception because the ban is necessary for the safe operation of the airport and to serve the civil aviation needs of the public. As discussed above, the Airport Authority has failed to bear its burden of proving that the ban is necessary either for the safe operation of the airport[40] or to serve the civil aviation needs of the public.[41] Hence, its argument that the ban falls within the "proprietary powers" exception fails. The Hearing Officer did not err in finding that Federal law preempts the ban.[42]

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[40] *See supra* p. 21.

[41] *See supra* p. 24.

[42] The Airport Authority and Greenwood also argue that even if the Airport Authority's total ban on scheduled operations was unlawful, operations at Centennial Airport would still be limited to nine-passenger aircraft, because a Federal statute went into effect in 1996 requiring airports to have a Part 139 certificate for scheduled operations involving aircraft of more than nine-passenger seats (49 U.S.C. § 44706), Centennial Airport does not have such a certificate, and the statute provides (in 49 U.S.C. § 44706(f)) that airport sponsors may not be forced to obtain a certificate.

While the Airport Authority and Greenwood argue that the statute is self-executing, the agency's position is that under 49 U.S.C. § 44706(e), the statute does not apply until 120 days after the agency sends implementing regulations and an economic impact report to Congress, and until that occurs, 30-passenger aircraft may operate at Centennial Airport. This issue will not be decided because it is not presented by the facts of this case. It is undisputed that the Airport Authority's ban on scheduled passenger service is total. The Airport Authority sought and obtained an injunction against Centennial Express's *six*-passenger aircraft.

XI. Conclusion

The Hearing Officer correctly affirmed the Director's determinations that the Airport Authority violated the following:

- 49 U.S.C. § 47107(a)(1) and standard Airport Improvement Program (AIP) grant assurance no. 22 (prohibiting economic discrimination).
- 49 U.S.C. §§ 47107(a)(4) and 40103(e) and standard AIP grant assurance no. 23 (prohibiting granting exclusive rights).
- 49 U.S.C. § 41713 (prohibiting state and local regulation of air carrier prices, routes, or services).

XII. Corrective Action

ACCORDINGLY, it is ordered that:

1. Arapahoe County Public Airport Authority (the Airport Authority) present a plan to the Airports Division, Northwest Mountain Region of the FAA within 60 days from the date of this final agency decision on how it intends to address the FAA's concerns by eliminating the violations outlined above;

2. Pending FAA approval of the corrective action plan specified in Ordering Paragraph 1, or until further notice, the Airport Authority is ineligible to apply for new FAA grants under 49 U.S.C. § 47106(d).[43]

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[43] The 180-day limit on suspension of eligibility contained in Section 47106(d) applies only to applications to receive AIP funds apportioned under 49 U.S.C. §§ 47114(c) and (e). The

FURTHER:

If the Airport Authority does not submit a corrective action plan in accordance with Ordering Paragraph 1 above, or petition for judicial review of this decision as set forth below, the FAA proposes to issue an order under 49 U.S.C. § 47122 directing the Airport Authority to eliminate the violations outlined above. The failure to comply with that order would result in termination of the Airport Authority's eligibility for new FAA grants.[44]

/s/ Susan L. Kurland
SUSAN L. KURLAND
Associate Administrator
for Airports

Issued on this 18th day of February, 1999.

Airport Authority is not eligible to receive these apportioned funds. Therefore, the 180-day limit does not apply.

[44] Persons with standing may seek judicial review of this decision in an appropriate United States Court of Appeals. The petition for review must be filed within 60 days. *See* 14 C.F.R. § 16.247 ("Judicial review of a final decision and order") for further information regarding judicial review.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ARAPAHOE COUNTY PUBLIC AIRPORT AUTHORITY, a political subdivision of the State of Colorado,	)	
Petitioner,	)	No. 99-9508
v.	)	
FEDERAL AVIATION ADMINISTRATION,	)	
Respondent,	)	
CITY OF GREENWOOD VILLAGE,	)	
Intervenor,	)	
and	)	
REGIONAL AIRLINE ASSOCIATION,	)	
Amicus Curiae.	)	

ORDER

Filed May 7, 2001

Before **BRORBY**, Circuit Judge, **McWILLIAMS**, Senior Judge and **ELLISON**,* District Judge.

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*The Honorable James O. Ellison, Senior United States District Judge for the Northern District of Oklahoma, sitting by designation.

Petitioner's and Intervenor's petitions for rehearing are denied.

The petitions for rehearing en banc were transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Steve Larson
Deputy Clerk

SUPREME COURT, STATE OF COLORADO
NO. 97SC123 April 13, 1998

ARAPAHOE COUNTY PUBLIC AIRPORT AUTHORITY, a political subdivision of the State of Colorado,

Petitioner,

v.

CENTENNIAL EXPRESS AIRLINES, INC., a Colorado corporation; and GOLDEN EAGLE CHARTERS, INC., d/b/a CENTENNIAL EXPRESS AIRWAYS, INC., a Colorado corporation,

Respondents.

(Filed April 13, 1998)

Certiorari to the Colorado Court of Appeals

EN BANC JUDGMENT REVERSED

Brega & Winters, P.C.
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Brian a. Magoon
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CHIEF JUSTICE VOLLACK delivered the Opinion of the Court.

JUSTICE SCOTT concurs and specially concurs.

JUSTICE BENDER dissents, and JUSTICE MARTINEZ joins in the dissent.

JUSTICE HOBBS does not participate.

We granted certiorari to review the court of appeals decision in *Arapahoe County Public Airport Authority v. Centennial Express Airlines, Inc.*, 942 P.2d 1270 (Colo. App. 1996), to determine whether the court of appeals erred in reversing a permanent injunction entered in favor of the plaintiff, Arapahoe County Public Airport Authority (the Authority), prohibiting the defendant, Centennial Express Airlines, Inc., and its wholly owned subsidiary, Golden Eagle Charters, Inc., d/b/a Centennial Express Airways, Inc. (Centennial Express), from conducting scheduled air carrier service in and out of Centennial Airport (Centennial). We reverse.

I.

Centennial was built in 1967 to serve the growing aviation needs of the Denver metropolitan region and has since become one of the largest and busiest general aviation facilities in the country.[1] Centennial is located fourteen miles southeast of downtown Denver and sits on

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[1] In 1988, Centennial ranked as the twenty-eighth busiest airport in the United States. One year later, Centennial was fourth nationally in based aircraft. In 1995, Centennial was the second busiest general aviation airport in the country.

approximately 1,200 acres of land in Arapahoe and Douglas Counties. In 1975, Arapahoe County established the Authority pursuant to the Public Airport Authority Law, sections 41-3-101 to -108, 17 C.R.S. (1973), to own and operate Centennial as a political subdivision of the State. The Authority owns all of the land and facilities at Centennial except for two runways which it leases from Arapahoe County.

To fund airport construction and operations, the Authority has accepted approximately $30.1 million in federal grants. As a condition to accepting these grants and pursuant to federal law, the Authority has given its assurance that it "will make its airport available as an airport for public use on fair and reasonable terms and without unjust discrimination, to all types, kinds, and classes of aeronautical uses." A separate assurance provides that the Authority "may prohibit or limit any given type, kind, or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public."

Local, regional, and national planning schemes designate Centennial as a general aviation reliever airport for Denver's primary air carrier airports, Stapleton International (Stapleton), which closed in February of 1995 and Denver International (DIA), which opened upon Stapleton's closure. Locally, resolutions passed by the Board of County Commissioners of Arapahoe County in 1966 approved funding for the construction of a general aviation airport. Newspaper accounts of open meetings held following this funding approval indicate that county officials hoped to lure new industry and expand the county's

tax base by building an airport to "serve general aviation, not scheduled carriers or military planes." A new airport would also ease general aviation overcrowding at Stapleton. In one news report, the Federal Aviation Administration (FAA) area director proclaimed that the airport was "a much needed reliever terminal for general aviation."

Regionally, the Denver Regional Council of Governments (DRCOG), a planning organization of county and municipal governments, has adopted several aviation plans that guide the development and operation of airports in the Denver area. Specifically, the 2010 Regional Aviation System Plan (2010 Plan), which was published by DRCOG in 1989, provides that Stapleton is the only commercial air carrier airport in the region and designates Centennial "as a non-commercial passenger, transport-category, general aviation reliever airport." Similarly, the Regional Aviation System Planning Program Data File, which was published by DRCOG in 1991, provides that Stapleton is the "air carrier facility for the Denver region" and categorizes Centennial "as a non-commercial passenger, transport category, G.A. reliever."[2]

Nationally, the National Plan of Integrated Airport Systems (NPIAS), which was presented to Congress by the Secretary of Transportation in 1991, does not include Centennial in its summary of Colorado's primary and

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[2] In November of 1995, after the facts giving rise to this dispute arose, DRCOG published the 2020 Regional Aviation System Plan (2020 Plan) to update the 2010 Plan. The 2020 Plan refers to Centennial as a "transport-category, general aviation airport, [that] is a designated reliever to DIA."

commercial service airports. Instead, the NPIAS lists Centennial as a reliever airport intended to alleviate general aviation congestion at Denver's primary commercial airport through 1999.

Due to its planned role as a general aviation reliever and strong opposition from citizens who live near the airport, scheduled passenger service has never been authorized at Centennial. While fixed-base air taxi and charter flights are permitted, Centennial's master plan, which was published in 1981, provides that air taxi, charter flights, and military use constitute less than one percent of the airport's total operations. Because scheduled passenger service has never been permitted, Centennial presently operates without a terminal, baggage system, or passenger security system.

Despite Centennial's lack of facilities, private efforts have been made to bring scheduled passenger service to the airport. In response, the Authority has increased efforts to prohibit scheduled passenger service. On July 21, 1993, the Authority sent a letter to the United States Department of Transportation (USDOT) asserting that the Authority did not have to approve applications for scheduled passenger service and asking USDOT for its opinion on the issue. On September 4, 1993, the Authority also amended the "Minimum Standards for Commercial Aeronautical Activities" (the Standards) governing operations at Centennial. These Standards now define "Airport Purpose" as

> any Authority action, undertaking or development that is consistent in maintaining the non-certificated status of the Airport and in preserving the Airport funding category as a "Reliever

> Airport" serving general aviation users. *Under no circumstances shall the Airport Purpose include scheduled passenger services.*

(Emphasis added.)

On December 20, 1994, Centennial Express began scheduled passenger service out of Centennial to Dalhart, Texas. Centennial Express has a valid air carrier certificate issued by the FAA.[3] At the time of its maiden flight, Centennial Express was aware of the Authority's ban on scheduled passenger service but chose to delay notifying the Authority until the return flight from Dalhart. Centennial Express also issued a press release announcing that it would soon provide scheduled passenger service from Centennial to Amarillo, Colorado Springs, Grand Junction, and other Western Slope airports in 1995. Additionally, Centennial Express planned to begin regular jet flights from Colorado Springs to Chicago, Kansas City, Houston, Dallas, Phoenix, Los Angeles, San Francisco, and Seattle.

The following day, the Authority filed suit in Arapahoe County District Court (the district court) seeking a temporary restraining order and preliminary and permanent injunctions preventing Centennial Express from conducting scheduled passenger service out of Centennial. On December 22, 1994, the district court granted the Authority's request for a temporary restraining order, concluding in part that

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[3] The FAA certificate authorized Centennial Express to carry up to 30 passengers for four scheduled round trips per week, per destination, in aircraft weighing less than 75,000 pounds.

> [r]eal, immediate, and irreparable injury may be prevented if [Centennial Express is] enjoined from conducting and expanding illegal scheduled passenger service at the Airport. [Centennial Express has] made a unilateral decision to conduct illegal scheduled passenger service at the Airport. [Centennial Express has] flaunted the law by disregarding the Airport's Minimum Standards. [The Authority] manages the Airport. Indeed, [the Authority's] reason to exist turns on its ability to govern and manage the Airport. If the requested relief is not provided, [the Authority] will be stripped of its ability and authority to manage the Airport.

On December 23, 1994, more than seventeen months after the Authority's initial request, USDOT responded to the Authority's letter as to whether it could ban scheduled passenger service at Centennial. In relevant part, the USDOT's letter provides as follows:

> In addressing similar cases in the past, FAA has found it arbitrary to exclude any particular class of service due to factors that are not related to the impacts of that service.
>
> Although the material that [the Authority] submitted states that approval of scheduled service would increase the number of operations and passengers at Centennial Airport, there was insufficient information submitted with [the Authority's] letter to demonstrate that a restriction of any particular category of operation could be adequately supported. For example, although individual factors are not alone likely to be dispositive, [the Authority's] letter does not discuss the nature and extent of any resulting environmental impact, congestion, or effect

> on airport facilities such as the terminal or parking, that would result from the initiation of scheduled service.

Later, the opinion letter states that the Authority's letter

> also raises a policy issue relating to how to harmonize several important goals – allowing the citizens of a region to plan and manage their aviation resources on a regional basis, while at the same time preserving and enhancing the performance of the national aviation system and ensuring that statutory and regulatory requirements associated with use of federal grant funds are not violated. . . . We firmly support regional planning and decision-making and strongly believe that local governments should, wherever possible, plan, develop and operate their transportation systems in an integrated and regional context, consistent with applicable federal law. . . .
>
> [W]here the volume of air traffic is approaching or exceeding the maximum practical capacity of an airport, an airport owner may designate a certain airport in a multiple airport system (under the same ownership and serving the same community) for use by a particular class of aircraft so long as the owner can assure that all classes of aeronautical needs can be fully accommodated within the system of airports under the owner's control. . . .
>
> The issue that this raises is whether [USDOT] should change its policy to extend the flexibility now afforded to multiple airports under joint ownership to individually-owned

> multiple airports which are planned and operated under a regional agreement. . . . Because this would be a significant policy change, full consideration by the public and the aviation community is warranted. Therefore, we will be initiating, early next year, a process to obtain a full range of views on this issue.

On January 10, 1995, after conducting several hearings, the district court entered a permanent injunction prohibiting Centennial Express from conducting scheduled passenger service out of Centennial.[4] Centennial Express appealed and also filed a complaint with the Federal Aviation Administration (FAA).[5] The court of appeals reversed the district court's ruling, concluding that the Authority's regulation prohibiting scheduled passenger service was preempted by 49 U.S.C. § 41713(b)(1) (1994). The court of appeals also held that the district court should have left the question of whether the Authority could prohibit scheduled passenger service to the federal administrative agencies' primary jurisdiction.

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[4] At a January 5, 1995, hearing, the parties stipulated that the district court would rule on the issue of permanent injunctive relief in order to expedite this case for appeal. For this reason, no preliminary injunction was issued in this case.

[5] Centennial Express's FAA complaint was the second challenging the Authority's ban on scheduled passenger service. The first complaint had been filed by an individual who is not a party to this action. Both complaints are still pending.

II.

At the outset, we must determine whether this court should defer to the federal agencies' holding concurrent jurisdiction over this case. The doctrine of primary jurisdiction, or the deference doctrine, calls for judicial deference in cases involving technical questions of fact uniquely within an agency's expertise and experience, or in cases where uniformity and consistency require administrative discretion. *See Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 303-04 (1976); *Columbia Gas Transmission Corp. v. Allied Chem. Corp.*, 652 F.2d 503, 519 n.14 (5th Cir. 1981); *Great Western Sugar Co. v. Northern Natural Gas Co.*, 661 P.2d 684, 690 (Colo. App. 1982). No fixed formula exists for deciding when to invoke this doctrine, but it should be utilized reluctantly where the issue is strictly a legal one that is within the conventional competence of the courts. *See Great Western Sugar*, 661 P.2d at 690.

The issues in this case do not involve complex questions of fact. Rather, we have been asked to consider whether the district court properly enjoined Centennial Express from conducting scheduled passenger service out of Centennial. As defenses, Centennial Express claims that (1) the Authority's regulation prohibiting scheduled passenger service at Centennial is preempted by federal law and (2) the ban on scheduled passenger service violates the terms of the Authority's federal grant assurances. In our view, these legal and interpretive questions do not "go beyond the understanding of judges" or lay "at the heart of the task assigned the agency by Congress." *See Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 580-81 (1st Cir. 1979).

Additionally, the FAA has yet to rule on either of the complaints despite the fact that they were filed more than three years ago. Similarly, although the USDOT opinion letter alludes to "initiating, early [in 1995], a process to obtain a full range of views on" its policy regarding individual airport participation in regional airport planning, we have no indication from the parties or USDOT that such efforts have begun. Because there is a strong public interest in resolving this case promptly, we refuse to defer to administrative action which is of "uncertain aid and uncertain speed." *See id.* at 581.[6]

Centennial Express also points to the USDOT opinion letter in arguing that deference is warranted in this case. In *Banner Advertising, Inc. v. People*, 868 P.2d 1077, 1083 (Colo. 1994), we addressed the level of deference we must afford an opinion letter issued by the FAA. Specifically, we explained:

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[6] Contrary to the court of appeals, we do not view *New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157, 171 (1st Cir. 1989), as dispositive here. In that case, the Second Circuit held that the district court erred in ruling on the merits of a case involving the imposition of landing fees at Boston's Logan Airport when the same issue was pending before the FAA. In the Second Circuit's view, the following federal actions, in addition to an FAA complaint, justified deferring to the FAA in that case: (1) the Secretary of Transportation had ordered a formal investigation into the complaint; and (2) the United States, as *amicus curiae*, had urged the district court to issue an injunction preserving the status quo until the USDOT's investigation was complete. *See id.* In this case, we are aware of no formal investigation into the FAA complaints and have received no indication from the federal government that reviewing the merits of this case is, in its view, inappropriate.

> [T]he opinion of the FAA's chief counsel . . . was not reached as a result of hearing adversary proceedings in which he found facts and reached conclusions of law. It is in no way binding on a court. Nevertheless, the letter was written as part of the official duties of the chief counsel, and is based on a level of more specialized expertise than most judges possess, so we may properly look to it for guidance. While opinion letters from administrative agencies are not binding authority, they can be used as persuasive authority.

Id. Contrary to *Banner,* where we chose to defer to the agency's letter, we believe the USDOT's opinion letter in this case does not require deference. First, the letter is brief, contains no federal preemption analysis, and fails to cite any federal cases for its propositions. Second, the letter is inconclusive because it states that the Authority submitted "insufficient information" on the impact scheduled passenger service would have at Centennial. Third, because the opinion letter is only persuasive authority, it is not binding on this court. *See id.*

In this case, Centennial Express began scheduled passenger service in clear defiance of the Authority's regulations, before the USDOT's opinion letter was issued, and before filing its FAA complaint. Nevertheless, Centennial Express asserts that even though it has disregarded valid regulations passed pursuant to state law, we must defer to the federal agencies' concurrent jurisdiction. We disagree. If we defer to the federal agencies, we would affirm Centennial Express's course of conduct and foreclose the Authority's only avenue of relief. This would allow future airport users to unilaterally conduct and

continue operations in violation of airport rules so long as they implicate federal jurisdiction in some way. Under these circumstances, we refuse to defer to the federal agencies' concurrent jurisdiction.

III.

Centennial Express argues that the ban on scheduled passenger service is preempted by federal law. We disagree.

Congress radically altered the character of commercial aviation when it amended the Federal Aviation Act and deregulated the airline industry pursuant to the Airline Deregulation Act of 1978 (ADA). *See* Pub. L. 95-504, 92 Stat. 1705. In so doing, Congress determined that market forces were better suited for promoting efficiency, innovation, low prices, variety, and quality in the air transportation industry. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992). However, the absence of federal regulation caused concern in Congress that individual states would pass inconsistent and conflicting laws regulating the airline industry. *See* H.R. Rep. 95-1211, at 15-16 (1978) *reprinted in* 1978 U.S.C.C.A.N. 3737, 3752; *see also Margolis v. United Airlines, Inc.*, 811 F. Supp. 318, 320-21 (E.D. Mich. 1993). Consequently, the ADA included a provision that preempted all state laws relating to the rates, routes, or services of an interstate air carrier. *See* 49 U.S.C. § 1305(a)(1) (Supp. III 1979). Currently, 49 U.S.C. § 41713(b)(1) (the ADA preemption provision) provides that a political subdivision of a state "may not enact or enforce a law, regulation, or other

provision having the force and effect of law related to a price, route, or service of an air carrier."[7]

Two cases from the United States Supreme Court offer guidance on the scope of the ADA preemption provision. In *Morales*, several airlines filed suit against the State of Texas seeking injunctive relief prohibiting enforcement of state regulations pertaining to airline fare advertising. The airlines argued that the regulations were preempted by the ADA preemption provision. Relying upon cases in which the Supreme Court interpreted a similarly worded preemption provision in the Employee Retirement Income Security Act of 1974 (ERISA), the Court determined that the ADA preemption provision expressed a broad preemptive purpose that included all "State enforcement actions having a connection with or reference to airline rates, routes, or services." *Morales*, 504 U.S. at 383-84; *see also American Airlines, Inc. v. Wolens*, 513 U.S. 219, 223 (1995). The *Morales* Court noted, however, that preemption was inappropriate where the state action affects airline rates, routes, and services "in too tenuous, remote, or peripheral a manner." *See Morales*, 504 U.S. at 390; *Wolens*, 513 U.S. at 224.

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[7] Congress reenacted Title 49 in 1994. Previously, 49 U.S.C. § 1305(a)(1) provided in relevant part that "no State . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any carrier." Although the language of this statute differs slightly from 49 U.S.C. § 41713(b)(1), Congress intended the revision to make no substantive change. *See American Airlines, Inc. v. Wolens*, 513 U.S. 219, 223 n.1 (1995). Therefore, even though many of the cases cited in this opinion interpret 49 U.S.C. § 1305(a)(1), this opinion refers to both § 1305(a)(1) and § 41713(b)(1) as the ADA preemption provision.

In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 654-56 (1995), the Supreme Court explained that it may have interpreted the "relate to" language in prior ERISA cases too broadly.[8] Specifically, the Court explained:

> If "relate to" were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for really, universally, relations stop nowhere. But that, of course, would be to read Congress's words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality. That said, we have to recognize that our prior attempt to construe the phrase "relate to" does not give us much help drawing the line here.

Id. at 655 (citation and internal quotation marks omitted). Instead, the Court explained that it must address ERISA preemption cases "with the starting presumption that Congress does not intend to supplant state law." *Id.* at 654. With this presumption in mind, the Court then

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[8] Although *Travelers* does not concern aviation law, *Morales* explains the connection to ERISA cases as follows:

> [W]e have held that a state law relates to an employee benefit plan, and is pre-empted by ERISA, if it has a connection with, or reference to, such a plan. Since the relevant language of the ADA is identical, we think it appropriate to adopt the same standard here.

Morales, 504 U.S. at 384 (citation and quotation marks omitted). *Travelers* is therefore highly instructive on the Supreme Court's current approach towards interpreting "identical" language in the ADA preemption provision. *Id.*

explained that it "simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Id.* at 656.

Despite the broad reach the *Morales* Court gave the ADA preemption provision, the *Travelers* decision establishes a less literal method for determining whether state regulations concerning aviation are preempted. Specifically, *Travelers* counsels that we should first presume "that Congress does not intend to supplant state law." *Id.* at 654. Then, we must review the objectives of the statute in defining "the scope of the state law that Congress understood would survive." *Id.* at 656.

Turning to the facts of this case, we believe that the Authority's ban on scheduled passenger service is not preempted. Because the regulation concerns an area of local and regional planning, it will not lead to inconsistent or conflicting state regulations.[9] Therefore, the

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[9] Besides planning Centennial's operations on a local level, the Authority's ban on scheduled passenger service also reflects the airport's regional role as a general aviation reliever for Denver's primary commercial airport. Other federal statutes indicate a willingness to cooperate with and defer to this type of local and regional aviation planning. *See* 49 U.S.C. § 40101(a)(8) (1994); 49 U.S.C. § 47101(g) (1994). Specifically, 49 U.S.C. § 47101(g) provides in pertinent part that

> the Secretary of Transportation shall cooperate with State and local officials in developing airport plans and programs that are based on overall transportation needs. The airport plans and programs shall be developed in coordination with other

regulation does not undermine the purpose of the ADA preemption provision.

The Authority's regulatory ban on scheduled service also survives scrutiny under the plain meaning of the ADA preemption provision because it does not regulate the manner in which airport users conduct their business. We disagree with the court of appeals that prohibiting scheduled passenger service "relates to" airline services because it does not concern typical service-oriented tasks such as ticketing, boarding procedures, providing meals and drinks to passengers, and baggage handling. *See Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995). Similarly, the Authority is not regulating airline fares or routes because the ban on scheduled service does not delineate what airlines can charge or where they can fly.

> transportation planning and considering comprehensive long-range land-use plans and overall social, economic, environmental, system performance, and energy conservation objectives. The process of developing airport plans and programs shall be continuing, cooperative, and comprehensive to the degree appropriate to the complexity of the transportation problems.

Without any indication that Congress intended to disregard local and regional aviation planning altogether, preemption is unwarranted in this case. *See Local 926, Int'l Union of Operating Eng'rs, AFL-CIO v. Jones*, 460 U.S. 669, 676 (1983) (explaining that "in the absence of compelling congressional direction," preemption is unwarranted when "the conduct at issue is only a peripheral concern of the Act or touches on interests so deeply rooted in local feeling and responsibility that . . . it could not be inferred that Congress intended to deprive the State of the power to act").

While Centennial Express has raised preemption as a defense to the Authority's ban on scheduled passenger service, we believe the Authority's actions more appropriately fall under 49 U.S.C. § 41713(b)(3) (1994) (the proprietor's exception), which provides conclusive support for the Authority's position. That section provides that the ADA preemption provision does not limit a political subdivision that owns or operates an airport "from carrying out its proprietary powers and rights."[10]

Federal courts have considered the scope of the proprietor's exception in two significant areas of airport management. The first, and most extensive, of these areas concerns an airport proprietor's ability to regulate airport noise. These cases hold that because they may be held liable for excessive noise, airport proprietors may restrict aircraft operations to accommodate permissible noise levels under the proprietor's exception. *See City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 635-36 n.14 (1973); *Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100, 104 (9th Cir. 1981); *British Airways Bd. v. Port Auth. of New York*, 558 F.2d 75, 84 (2d Cir. 1977).

The second area of airport management that has been deemed to fall under the proprietor's control are perimeter rules, which restrict a commercial flight's maximum radius in order to limit an airport's ground congestion

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[10] For purposes of applying the proprietor's exception, a proprietor has been defined as one possessing or controlling ownership, operation, promotion, and the ability to acquire necessary approach easements. *See San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306, 1317 (9th Cir. 1981). Clearly, the Authority is Centennial's proprietor under this definition.

and divert long-haul traffic to other regional airports. *See City of Houston v. Federal Aviation Admin.*, 679 F.2d 1184, 1196 (5th Cir. 1982); *Western Air Lines, Inc. v. Port Auth. of New York & New Jersey*, 658 F. Supp. 952, 958 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 222 (2d Cir. 1987). In contrast to cases affirming noise restrictions, these cases uphold perimeter rules even though they have no relationship to an airport's liability exposure. As one of these courts has reasoned,

> although questions of permissible noise regulation predominate in the courts, other proprietor-imposed regulations are presently accepted as valid exercises of proprietary powers. A proprietor's interest in regulating ground congestion at its airports would appear to be at the core of the proprietor's function as airport manager, perhaps even more so than the regulation of noise; and the ability of a proprietor . . . to allocate air traffic in its three airport system is important to the advancement of this interest.

Western Air Lines, 658 F. Supp. at 957 (internal quotation marks omitted).

There are no cases that address the specific question posed by the present case. Nevertheless, we believe that an airport proprietor's ban on scheduled passenger service falls squarely within the proprietor's exception. While regulations concerning aircraft noise and ground congestion restrict the manner in which airport users conduct their operations, a ban on scheduled service seeks to accomplish a more fundamental goal in setting the boundaries of permissible operations at the airport. The power to control an airport's size exists at the core of the proprietor's function and is especially strong where,

as here, the prohibited use has never been allowed, or even contemplated. *See id.; see also Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91, 97 (2d Cir. 1986) (finding that, under the proprietor's exception, a municipality could prevent a seasonal operator from expanding its operations to include year-round service).

By unilaterally commencing scheduled passenger service out of Centennial, Centennial Express has essentially proclaimed that the Authority, a political subdivision of the state, lacks the power to define and limit the scope of permissible operations at its airport. However, Colorado law clearly gives the Authority this power. *See* § 41-3-106(1)(h), 11 C.R.S. (1997).[11] Accordingly, the Authority's ban on scheduled passenger service is a valid exercise of its proprietary powers that is not preempted by federal law.

IV.

Centennial Express also argues that the Authority has violated the terms of the federal grant assurances under which it has agreed to "make its airport available as an airport for public use on fair and reasonable terms

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[11] Section 41-3-106(1)(h) provides in part that the Authority has the power

> to provide rules and regulations governing the use of such airport and facilities and the use of other property and means of transportation within or over said airport, landing field, and navigation facilities . . . and to exercise such powers as may be required or consistent with the promotion of aeronautics and the furtherance of commerce and navigation by air[.]

and without unjust discrimination, to all types, kinds, and classes of aeronautical uses." *See* 49 U.S.C. § 47107(a) (1994) (providing that project grant application may be approved only if Secretary of Transportation receives satisfactory written assurances). We disagree.

While the grant assurances prohibit discrimination among different types, kinds, and classes of aeronautical uses, we refuse to construe them so broadly that airport proprietors must accommodate every possible aeronautical use. By the terms of the assurances, an airport proprietor who has accepted federal funding must make its airport available on "fair and reasonable terms without unjust discrimination." The anti-discrimination provision therefore prohibits airport owners from using their proprietary power to grant one operator access while denying access to, or imposing unfair terms on, a similarly situated operator.[12] Here, the Authority is not discriminating against a particular operator because the ban on

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[12] In *City of Dallas v. Southwest Airlines Co.*, 371 F.Supp. 1015, 1029 (N.D. Tex. 1973), the court determined that it is discriminatory for an airport proprietor to ban scheduled passenger service in order to serve general aviation exclusively. However, we view that case as offering little support for Centennial Express's position. *City of Dallas* involved a completely different regulatory setting because that case was decided five years before deregulation fundamentally changed the manner in which airlines, and airports, conducted their operations. Further, *City of Dallas* concerned a ban enacted *after* that airport proprietor had previously allowed scheduled passenger operations at the airport. Therefore, facilities and procedures were already in place to accommodate scheduled passenger service. Such is not the case at Centennial, where scheduled passenger service has never been permitted.

scheduled passenger service applies to all airport users equally.

Furthermore, a separate assurance allows airport proprietors to prohibit specific aeronautical uses "if such action is necessary for the safe operation of the airport or necessary to service the civil aviation needs of the public." The Authority's ban on scheduled passenger service is necessary to ensure the safe operation of the airport. Although it initially plans to operate on a small scale, Centennial Express has ambitions to become much larger. Opening Centennial's doors to Centennial Express would also require the Authority to make Centennial available to other airlines who wish to provide scheduled passenger service. *See* 49 U.S.C. § 47107(a)(4) (1994). These new operators, some of whom may find conditions at Centennial more appealing than DIA, promise to bring increased aviation traffic to an already congested airport. This increased congestion is sure to have an impact on airport safety. Increased passenger traffic also requires additional facilities such as a terminal, security and baggage systems, which are currently lacking at Centennial. Without these facilities, the airport would become unsafe for passenger use.

Local, regional, and national aviation planning also strongly indicates that the aviation needs of the public are better served if Centennial continues to function as a general aviation reliever airport. The sudden imposition of scheduled passenger service and a resulting increase in commercial operations at Centennial would disrupt this planning scheme and force general aviation operators out of this valuable reliever airport. *See* 49 U.S.C. § 47102(18) (1994) (defining a "reliever airport" in part as an airport

designated "to provide more general aviation access to the overall community"). Currently, Centennial is congested and accommodates the majority of the region's general aviation demand while DIA continues to operate well below capacity.[13] A shift in commercial operations from DIA to Centennial would result in more of a disparity in the allocation of aircraft operations among the region's airports. *See City of Houston,* 679 F.2d at 1191.

The Authority's regulation prohibiting scheduled passenger service does not discriminate against individual airport users. Furthermore, the ban on scheduled passenger service "is necessary for the safe operation of the airport" and services "the civil aviation needs of the public." For these reasons, the Authority has not violated the terms of the federal grant assurances.

V.

The Authority, as the owner and operator of Centennial, has the power to enact regulations which prohibit scheduled passenger service at its airport. This regulatory ban is not preempted by federal law and does not violate the terms of grant assurances that the Authority has given to the federal government. We therefore hold that the district court properly enjoined Centennial Express from conducting scheduled passenger service out of Centennial. Accordingly, we reverse the court of appeals and

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[13] DRCOG's 2020 Plan explains that in 1995, DIA was "currently operating with five of the 12 planned runways and 87 of the planned 206 gates."

remand with directions to reinstate the district court's order.

JUSTICE SCOTT concurs and specially concurs.

JUSTICE BENDER dissents, and JUSTICE MARTINEZ joins in the dissent.

JUSTICE HOBBS does not participate.

JUSTICE SCOTT concurs and specially concurs:

We granted certiorari and ordered briefing by the parties regarding two questions:

> (1) Whether a political subdivision of the State, which owns and operates a general aviation reliever airport, and which has never permitted scheduled passenger service, may prohibit scheduled passenger service under state and federal law.
>
> (2) Whether a state court may determine the proprietary powers of a political subdivision of the State, which owns and operates a general aviation reliever airport, to ban scheduled passenger service.

In answer to the first question, like the majority, I conclude that a state political subdivision, Arapahoe County Public Airport Authority (the Authority), which owns and operates a general aviation reliever airport without a terminal and passenger security system, may prohibit scheduled passenger service. My response to the second question is predicated on the answer to the first:

Yes, in order to effect a prohibition on scheduled passenger service and to protect its proprietary interests, the Authority may obtain the aid of our state courts.

I write separately, however, to make clear that, in my view, because the Federal Aviation Administration (FAA) has not acted, it is inappropriate at this time to conclude that any such prohibition by the Authority is preempted. Likewise, I believe it would not be proper or prudent to withhold judicial review on this record in light of the conduct of Centennial Express Airlines, Inc. (Centennial), or under the assumption the FAA will act.

Because I fail to see how the state injunction interferes with any agency action or otherwise exercises jurisdiction in excess of what is necessary to stay the actions of Centennial, which threaten the proprietary interests of a state agency, I find no error in the district court orders. Consequently, I join the opinion of Chief Justice Vollack to reverse the judgment of the court of appeals.

I.

State courts generally have concurrent jurisdiction with the federal courts to decide questions of federal law. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). I can see no reason why a state court's exercise of concurrent jurisdiction over a particular set of questions would be displaced because a party before the court subsequently initiates additional proceedings with a federal agency that has concurrent jurisdiction over those questions. Therefore, I have no trouble concluding that the district court had the power to decide both the state and

federal questions necessary to resolve this case with injunctive orders issued on the merits.

II.

The claim raised by the Authority in the district court was based principally on state law. Indeed, few can question that the Authority plainly has the power to exclude scheduled passenger service from Centennial Airport, unless, of course, Congress preempts state laws permitting such a prohibition, *see* maj. op. at 13-14, 18-22; dissenting op. at 9 (Bender, J.); *see also Banner Advertising, Inc. v. People of the City of Boulder*, 868 P.2d 1077, 1080 (Colo. 1994), which Congress has not done.

In addition, preemption may occur pursuant to a federal statute authorizing the FAA, by formal agency action, to preempt state law. However, unless the FAA acts within its defined authority, no preemption results. It is uncontroverted that the FAA has not acted.[1]

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[1] For purposes of this opinion, I am willing to assume that the FAA has, by statutory grant, the power to preempt the Authority's regulations. Moreover, under the grant agreements, the FAA may also be able to prevent the Authority from barring scheduled passenger service pursuant to the various assurances or contract clauses under the terms of the grant agreement. *See* 14 C.F.R. § 16.1-16.307 (establishing rules of practice for complaints involving violations of FAA regulations and grant assurances). The FAA is obligated to enforce its grant agreements and, where necessary, to compel compliance by its various grant recipients. *See* 14 C.F.R. § 151.7(a) (providing that FAA may authorize grant funding only where the FAA administrator is satisfied grant assurances have been or will be met). Hence, the FAA may attempt to invoke the assurances or

In that vacuum, on December 22, 1994, the district court first issued a temporary restraining order (temporary order). The temporary order was, by its terms, an order that "would preserve the status quo pending a trial on the merits." As the court explained, "[t]he status quo is that no scheduled passenger service is allowed at the Airport. . . . Granting [the] order would preserve the status quo." Thus, the court ordered Centennial "to refrain immediately from conducting and/or expanding scheduled passenger service at Centennial Airport."

Subsequently, the district court issued its Permanent Injunctive Order of January 10, 1995. However, as I read the court's order, it has self-imposed limitations worthy of note. Building upon the temporary order, the permanent injunction states that it "preserve[s] the status quo[,] no scheduled passenger service," and that it "PERMANENTLY ENJOINS [Centennial] . . . to *refrain immediately* from conducting scheduled passenger service at Centennial Airport *so long as such use is prohibited by the Minimum Standards* of the Arapahoe County Public Airport Authority." (Emphasis added.)

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contract clauses of the grant agreement as a bar to the Authority's actions based on a breach of contract theory. Of course, if the FAA is unable to enforce the grant agreements administratively or the Authority wishes to challenge the FAA action, the matter must be litigated in federal court because the United States would be a party. Notwithstanding the assurances under the grant agreement, in the event a grantee violates FAA regulations, the agency might also commence an enforcement proceeding under the FAA's other regulations. Nonetheless, the limiting factor in any preemption analysis here is the failure of the FAA to act and the fact no party has turned to the federal courts to compel FAA action.

Here, in the absence of FAA action, the Minimum Standards of the Arapahoe County Public Airport Authority continue to prohibit scheduled passenger service. I therefore agree that, under these circumstances, the district court did not err when it issued its injunction barring Centennial from conducting scheduled passenger flights based on the state law grounds urged by the Authority.

Consistent with our holding today, we have previously recognized that even where a court does *not* have jurisdiction to decide a controversy on the merits, it may nonetheless issue an injunction to preserve the status quo pending resolution of the dispute in an appropriate forum. *See Hughley v. Rocky Mtn. Health Maintenance Organization, Inc.*, 927 P.2d 1325, 1330 (Colo. 1996) (court may enter injunction to preserve status quo despite statutory divestiture of jurisdiction over merits of dispute submitted to arbitration); *Merrill Lynch, Pierce, Fenner, & Smith, Inc. v. District Court*, 672 P.2d 1015, 1018-19 (Colo. 1983) (same).

In my view, there can be little question as to whether the district court had jurisdiction over the state law issue and was obligated to exercise the state judicial power. Our constitution does not contemplate that a trial court can, as executive departments of government may, avoid a matter properly before it solely by exercise of its discretion. Colo. Const. Art. II, § 6. ("Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay.") As the United States Supreme Court held in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821):

> We cannot pass [a case] by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.

III.

In sum, an injunction was appropriate to protect the proprietary interests of the Authority. Therefore, I too would reverse the judgment of the court of appeals. Accordingly, I join the majority in holding that the district court's order enjoining Centennial to preserve the status quo was appropriate to resolve the dispute before that court.

Justice BENDER dissenting:

The majority holds that the Arapahoe County Airport Authority's (Authority) ban on scheduled passenger service is not preempted by 49 U.S.C. § 41713(b)(1) (1994) because the ban does not relate to rates, routes, or services. *See* maj. op. at 19. The majority also determines that the ban is not preempted because it falls within the proprietary powers exception to preemption set forth in 49 U.S.C. § 41713(b)(3) (1994), and that the ban is valid

because it does not violate federal funding regulations. *See id.* at 19, 22. The majority reasons that the district court's exercise of jurisdiction in this case is appropriate because the state court system need not defer to the Federal Aviation Administration (FAA) of the Department of Transportation (DOT) regarding the applicability of the proprietary powers exception and the validity of this state regulation under federal funding requirements. *See id.* at 592.

I agree with the court of appeals' decision that the Authority's ban on scheduled passenger service is preempted by federal law, and that the applicability of the proprietary powers exception to the preemption statute should be determined by the FAA in keeping with the doctrine of primary jurisdiction. I would additionally hold that the state court system should defer to the FAA on the allegations of federal funding violations.Therefore, I believe the court of appeals was correct to reverse the injunction entered by the district court. While I agree with the majority that state courts and the FAA possess concurrent jurisdiction over the applicability of the proprietary powers exception and the question of whether the Authority's ban violates federal grant assurances, I would not address either issue and would defer to the FAA because both issues present important policy considerations properly resolved by a federal administrative agency. In addition, the exercise of jurisdiction by our state court system involves a high risk of inconsistent results between our state system and the federal administrative forum. Thus, I would affirm the decision of the court of appeals, and I respectfully dissent from the majority opinion.

I.

Centennial Airport was founded in 1967. Construction of the airport was made possible by $30.1 million in federal grants given in exchange for the Authority's assurances that "the airport will be available for public use on reasonable conditions and without unjust discrimination," 49 U.S.C. § 47107(a)(1) (1994), and that the airport would be "open to all types, kinds, and classes of aeronautical use on fair and reasonable terms without discrimination between such types, kinds, and classes . . . [unless] such action is necessary for the safe operation of the Airport or necessary to serve the civil aviation needs of the public." 14 C.F.R. § 152, app. D, 18 (1997). Use of the airport is governed by state and federal law and by regulations promulgated by the Authority. Because the Authority is a political subdivision of the state, these regulations, entitled "Minimum Standards for Commercial Aeronautical Activities" ("Minimum Standards"), have the force and effect of state law. *See* § 41-3-102, 11 C.R.S. (1997) (the Authority is a political subdivision of the state); *cf.* § 41-3-106(1)(h), 11 C.R.S. (1997) (conferring power to regulate certain airport activities).

The airport was designed as a general aviation airport and therefore lacks the facilities associated with commercial passenger air transport, such as a terminal or baggage system. Nonetheless, the Authority historically has allowed certain types of passenger services -- unscheduled passenger services -- at the airport. Unscheduled passenger services are those in which the flight times and destinations are not offered to the public

in advance. *Cf.* 14 C.F.R. § 119.3 (1997) ("defining scheduled passenger service").[1] Instead, unscheduled passenger services allow an individual to contact the airline and arrange for private transportation, but at a high price. Examples of unscheduled passenger services include air taxis and charter flights. Many of the companies offering unscheduled passenger services at Centennial Airport operate pursuant to a "Part 135" air carrier certificate[2] issued by the FAA. A Part 135 air carrier certificate authorizes the use of airplanes that have up to thirty seats and weigh no more than 75,000 pounds when fully loaded. *See id.* A Part 135 certificate

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[1] Although the Code of Federal Regulations does not define "unscheduled operations," a "scheduled operation" is defined as follows:

> [A]ny common carriage passenger-carrying operation for compensation or hire conducted by an air carrier or commercial operator for which the certificate holder or its representative offers in advance the departure location, departure time, and arrival location.

14 C.F.R. § 119.3 (1997). Hence, an unscheduled service is a similar operation that does not offer flight information in advance. "Common carriage" is a service using aircraft with 30 or fewer seats that weighs no more than 75,000 pounds. *See id.* A "passenger-carrying operation" is a service that provides less than five round trips per week on at least one route between two or more points. *See id.*

[2] 14 C.F.R. pt. 135 (1997) is commonly known as Part 135. An operation conducted pursuant to a Part 135 air carrier certificate is restricted to certain types of aircraft as set forth in Part 119. There are numerous other Part 135 air carriers at Centennial Airport. Some of these carriers are operating under an air carrier certificate identical to the one the FAA issued to Centennial Express.

allows an operator to conduct unlimited unscheduled passenger services but limits an operator to conduct no more than four scheduled round trips per week on at least one route between two or more points. *See id.* The Authority permits many other commercial activities, including air cargo, commercial flying clubs, flight training, and sightseeing tours.

Various parties sought the Authority's permission to initiate scheduled passenger service at Centennial Airport and were denied. On July 21, 1993, the Authority sent a letter to the DOT requesting the DOT's opinion on whether the Authority could deny applications for scheduled passenger service without violating federal law. In September of 1994, the Authority amended the Minimum Standards to prohibit scheduled passenger service.[3]

Shortly thereafter, the DOT mailed a letter to the Authority in response to the Authority's inquiries. In this letter, the FAA stated that although the information provided by the Authority was not sufficient to allow the FAA to reach a conclusive determination, the exclusion of

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[3] The amended version of the Minimum Standards provides, in pertinent part:

> An Air Carrier operator is an entity that provides scheduled passenger services and operates under the appropriate [federal aviation regulations] . . . with aircraft that provide no more than 30 passenger seats and are within the weight limitations established for the Airport in its Rules and Regulations. (*This category is not consistent with the Airport Purpose and will not be allowed to operate at the Airport unless required by final court order.*)

(Emphasis in original.)

a particular class of service, such as the Authority's ban on scheduled passenger service, is generally arbitrary and invalid. The FAA then stated that the Authority's ban on scheduled passenger service raised important policy questions regarding harmonizing regional planning with national aviation requirements, and that the FAA would commence a proceeding to "obtain a full range of views on this issue."

Centennial Express operates charter services out of Centennial Airport under an agreement with the Authority in which Centennial Express agreed to use the airfield in accordance with state and federal law and in conformity with the Minimum Standards. On December 20, 1994, Centennial Express obtained a Part 135 air carrier certificate from the FAA. The air carrier certificate authorized Centennial Express to provide scheduled passenger services in the contiguous United States, Alaska, Canada, and Mexico. The certificate further authorized Centennial Express to carry up to thirty passengers for four scheduled round trips per week, per destination. The same day, Centennial Express, acting unilaterally, began its FAA-approved scheduled passenger service on its King Air aircraft,[4] with routes including service to Centennial Airport.

Upon learning that Centennial Express was conducting scheduled passenger service in violation of the Minimum Standards, the Authority filed suit against

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[4] The King Air aircraft is quieter than a number of other aircraft currently in use at the airport. There are at least twenty planes operating out of the airport similar to those used by Centennial Express.

Centennial Express in district court. The Authority sought a permanent injunction prohibiting Centennial Express from providing scheduled passenger service at Centennial Airport.

Centennial Express raised several affirmative defenses. It argued that the Authority's prohibition on scheduled passenger service was not valid because the ban violated the Authority's grant agreements with the federal government by discriminating unjustly between classes of airport users. In its view the Authority's ban discriminated against scheduled passenger service because the Authority permitted unscheduled passenger services in the form of

> charter service, air cargo service, corporate jet service, private aircraft of all sizes and kinds, planes noisier than Centennial Express planes, or planes identical to or larger than Centennial Express planes. [The Authority] does not seek to exclude all holders of Part 135 air carrier certificates, the certificate held by Centennial Express. [The Authority] does not seek to prohibit the frequency of any kind of flight in and out of the Airport, but merely seeks to discriminate against scheduled passenger service.

Additionally, Centennial Express argued that the ban was unenforceable because it was preempted by 49 U.S.C. § 41713(b)(1), which provides in pertinent part:

> *Preemption.* (1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that

> may provide air transportation under this subpart.

The Authority countered that the prohibition on scheduled passenger service was not preempted by 49 U.S.C. § 41713(b)(1) because subsection (3) of the same statute contains an exception that allows airport proprietors to promulgate regulations necessary to protect their rights as proprietors. Subsection (3) provides:

> This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

49 U.S.C. § 41713(b)(3). Centennial Express argued that the proprietary powers exception did not apply because this exception is narrow and does not permit a proprietor to enact discriminatory regulations in direct conflict with federal anti-discrimination requirements.

The district court determined that Centennial Express's operation of scheduled passenger service violated the Minimum Standards. The district court rejected the affirmative defenses raised by Centennial Express, stating that the ban did not constitute unjust discrimination under the federal grant agreements and that the ban was not preempted because it was within the scope of the Authority's proprietary powers.

Centennial Express filed a formal complaint against the Authority with the FAA, alleging that the Authority's ban on scheduled passenger service is invalid because it

is discriminatory, in violation of federal funding regulations.[5] Centennial Express also appealed to the court of appeals. The court of appeals reversed, holding that the prohibition was preempted by 49 U.S.C. § 41713(b)(1) and that the applicability of the proprietor's rights exception contained in 49 U.S.C. § 41713(b)(3) was a matter that must be determined by the FAA rather than the state courts. The court of appeals did not address the issue of federal funding. The Authority then petitioned this court for certiorari review.

II. Preemption

The majority holds that the Authority's ban on scheduled passenger service is enforceable because the ban does not fall within the scope of the express preemption statute, 49 U.S.C. § 41713(b)(1). *See* maj. op. at 18. I disagree.

The Supremacy Clause of the United States Constitution authorizes Congress to enact legislation that preempts state law. *See* U.S. Const. art. VI, cl. 2. Preemption occurs in one of three ways: by express terms, by implication when Congress regulates an area in a comprehensive fashion, or by a conflict between federal and state law. *See New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995).

In 1978, Congress enacted the Airline Deregulation Act ("ADA") which largely deregulated domestic air transport. "To ensure that the States would not undo

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[5] To date, the formal complaint is still pending before the FAA.

federal deregulation with regulation of their own, the ADA included a pre-emption provision, prohibiting the States from enforcing any law 'relating to rates, routes, or services' of any air carrier.' " *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378-79 (1992).

In *Morales*, the United States Supreme Court explained that the phrase "relating to" should be interpreted broadly and that "[s]tate enforcement actions having a connection with or reference to airline 'rates, routes, or services' " are preempted. *Id.* at 384. For example, in *Morales*, the court held that state requirements on the airlines' advertisement of fares was preempted. The Court determined that the restrictions would have a significant impact on the airlines' ability to market their product, which in turn would have a significant impact on the fares the airlines charged. Thus, the restrictions "related to" rates and were preempted.

Similarly, the Authority's ban on scheduled passenger service at Centennial Airport significantly impacts the service that Centennial Express provides at the airport and the services available at Centennial Airport to the citizens of our state who wish to travel to the destinations that Centennial Express seeks to serve – Dalhart and Amarillo, Texas; Colorado Springs; and Grand Junction.

The policy underlying the ADA supports the view that the Authority's ban on scheduled passenger service is preempted. The ban is inconsistent with the ADA's goals of furthering "the availability of a variety of adequate, economic, efficient, and low-priced services," 49 U.S.C. § 40101(4) (1994), and "encouraging entry into air transportation markets by new and existing air carriers

and the continued strengthening of small air carriers to ensure a more effective and competitive airline industry." 49 U.S.C. § 40101(13) (1994).

The majority relies upon *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995), for the proposition that the ban does not relate to "services" because the definition of "services" provided by an airline does not include the transportation itself. *See* maj. op. at 18-19. I agree with the majority that *Hodges* is instructive in this case; however, I read *Hodges* to compel the opposite conclusion – that the transportation provided by an airline is a "service":

> Elements of the air carrier service . . . include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, *in addition to the transportation itself.*

Hodges, 44 F.3d at 336 (emphasis added); *see also Butcher v. City of Houston*, 813 F. Supp. 515, 517-18 (S.D. Tex. 1993).[6] Thus, I disagree with the majority's determination that transportation is not a "service" for purposes of 49 U.S.C. § 41713(b)(1).

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[6] The *Butcher* court stated:

> [O]ne can imagine the effect of different states requiring a certain frequency of airline service to certain of their cities, or mandating that airline service be nonstop between certain cities. . . . These kinds of "services" . . . are distinctively incident to the provision of airline service to the public and, just like rates and routes, are beyond the power of states to regulate or otherwise affect by local law.

Butcher, 813 F. Supp. at 517-18.

The majority holds that the ban affects services in " 'too tenuous, remote, or peripheral a manner' to have pre-emptive effect." *Morales*, 504 U.S. at 390 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 (1983)). It is true that the phrase "relate to" has its limits. For example, in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995), the Supreme Court held the words "relate to" in the ERISA preemption provision did not displace a state regulation that required hospitals to assess a surcharge on certain patients. *Id.* at 661. The Court determined that the connection between the surcharge and ERISA benefit plans was too remote.

In my view, *Travelers* is not similar to the Authority's ban on scheduled passenger service at Centennial Airport because the ban on scheduled service substantially relates to the services offered by Centennial Express. This connection is significantly greater than the tenuous connection presented in *Travelers*. The Authority's ban is more analogous to the prohibition in *Morales*, which " 'plainly does not present a borderline question.' " *Morales*, 504 U.S. at 390 (quoting *Shaw*, 463 U.S. at 100); *see also American Airlines, Inc. v. Wolens*, 513 U.S. 219, 226 (1995) (stating that frequent flier programs unquestionably "related to" rates for purposes of 49 U.S.C. § 41713(b)(1)).

The Supreme Court instructs us to interpret the words "relate to" in 49 U.S.C. § 41713(b)(1) broadly. *See Morales*, 504 U.S. at 383-84 (citing numerous cases in which the court emphasized the broad scope of the phrase "relate to"). The majority's determination that the Authority's ban does not "relate to" services is inconsistent with this mandate. For the above reasons, I would

hold that the Authority's ban on scheduled passenger service "relates to" services and is explicitly preempted by 49 U.S.C. § 41713(b)(1).

III. Doctrine of Primary Jurisdiction

The majority chooses to address the scope of the proprietary powers exception and Centennial Express's assertion that the Authority's ban is unenforceable because it conflicts with the Authority's federal funding assurances. The majority chooses not to defer to the FAA on these issues, in part because of the failure of the FAA to act promptly in this matter and Centennial Express's unilateral action of conducting scheduled passenger service in direct conflict with the Authority's Minimum Standards. I agree that the delay in the administrative forum and Centennial Express's violation of the Minimum Standards are regrettable and unfortunate. However, on balance, I believe this court should defer to the FAA's jurisdiction on both the proprietary powers question and the federal funding issue in keeping with the doctrine of primary jurisdiction.

The doctrine of primary jurisdiction, also known as the deference doctrine, is "a means of coordinating administrative and judicial machinery" to promote consistent decisions that reflect agency expertise. *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 580 (1st Cir. 1979). The doctrine does not determine the existence of jurisdiction. Instead, it "comes into play only when both the court and the agency have jurisdiction over at least portions of the dispute." *Id.* at 581 n.1. The issue "is one of harmony, efficiency, and prudence." *Id.*

In determining whether to defer to an agency, courts should examine three factors: "(1) whether the agency determination lay at the heart of the task assigned the agency by Congress; (2) whether agency expertise was required to unravel intricate, technical facts; and (3) whether, though perhaps not determinative, the agency determination would materially aid the court." *Id.* at 580-81. Another consideration may be whether the agency has an established procedure designed to resolve particular kinds of disputes. *See id.* at 581.

Here, Centennial Express has filed a formal complaint with the FAA alleging that the Authority's ban on scheduled passenger services is discriminatory and therefore invalid under federal funding regulations. The state court system is confronted with the same question: whether the Authority's ban is non-discriminatory. This is because both the applicability of the proprietary powers exception and Centennial Express's federal funding argument depend on the determination of that question. *See Midway Airlines, Inc. v. County of Westchester*, 584 F. Supp. 436, 440-41 (S.D.N.Y. 1984) (airport regulations imposed pursuant to proprietary powers must be reasonable, non-arbitrary, and non-discriminatory); *City of Dallas v. Southwest Airlines Co.*, 371 F. Supp. 1015, 1028-29 (N.D. Tex. 1973) (an airport regulation that conflicts with federal non-discrimination requirements will not be upheld and is in violation of the federal funding assurances).[7] I agree with the majority that we possess

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[7] I question the majority's interpretation of the scope of the proprietary powers exception. The proprietary powers exception allows a publicly owned airport to take certain

concurrent jurisdiction with the FAA on whether the Authority's ban is non-discriminatory. *See County of Broome v. Commuter Airlines, Inc.*, 442 N.Y.S.2d 652, 654-55 (N.Y. App. Div. 1981) (stating that state courts have jurisdiction to determine the applicability of the proprietary powers exception); *City of Dallas*, 371 F. Supp. at 1028-29 (finding an airport proprietor in violation of federal funding requirements).

As I read the sparse precedent in this area, discrimination may occur not only within a class of aeronautical users, but also between classes of aeronautical users. *See City of Dallas*, 371 F. Supp. at 1031. In *City of Dallas*, the court held that prohibition of scheduled passenger service at an airport that permitted passenger charter flights impermissibly discriminated between classes of airport users. *See id.* In reaching this conclusion, the court stated:

> [C]harter flights carrying passengers for hire on an unscheduled basis will continue to operate

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actions in its capacity as a proprietor that it could not take as a regulator under its police power. *See City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 635 n.14 (1973). However, airport regulations imposed pursuant to proprietary powers must be reasonable, non-arbitrary, and non-discriminatory. *See Midway*, 584 F. Supp. at 440-41. The precise scope of the proprietary powers exception is unsettled. *See Western Air Lines, Inc. v. Port Auth.*, 658 F. Supp. 952, 956 (S.D.N.Y. 1986). However, proprietary powers are extremely limited, *see City of Houston v. Federal Aviation Admin.*, 679 F.2d 1184, 1194 (5th Cir. 1982), and "have never been deemed broad enough to authorize a municipality to adopt regulations which are in direct conflict with FAA regulations." *Skydiving Ctr. of Greater Washington, D.C., Inc. v. St. Mary's County Airport Comm'n*, 823 F. Supp. 1273, 1283 (D.Md. 1993).

> out of Love Field. . . . [S]ome of the operations to remain at Love Field will use planes larger than Southwest's; some will use planes noisier than Southwest's; some will use planes identical to Southwest's. . . .
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> . . . .
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> . . . In place of the preference accorded mass transportation . . . Plaintiffs herein, in determining who shall have access to Love Field, have preferred private aircraft, corporate jets, unscheduled cargo flights, maintenance flights, and ferry flights over Southwest's commercial service. . . .
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> . . . .
>
> . . . Plaintiffs' unsystematic classification discriminates . . . between uses within the same general class. . . . Charter flights, which may use larger or smaller aircraft than Southwest Airlines, may remain at Love Field, while Southwest Airlines must go.

Id. at 1028, 1029, 1031; *see also Midway*, 584 F. Supp. at 440-41 (holding application for access to airport in abeyance was a valid exercise of proprietary powers because airport board was not banning a particular user from the airport, only asking for adequate time to formulate plans to allocate scarce resources).

The majority's discussion of proprietary powers fails to address the non-discrimination requirement of the proprietary powers doctrine. In a separate discussion dealing with the issue of whether the Authority is in violation of its grant assurances of non-discrimination, the majority states that "the Authority is not discriminating against a

particular operator because the ban on scheduled passenger service applies to all airport users equally." Maj. op. at 23. In other words, the majority holds that the ban is not discriminatory because the Authority has never allowed scheduled passenger service at Centennial Airport. *See id.* at 23 n.12. The majority attempts to distinguish *City of Dallas* on the basis that the ban on scheduled passenger services in that case prohibited operations previously allowed at the airport, while the Authority has never permitted unscheduled passenger services at Centennial Airport. *See id.* (discussing *City of Dallas*).

However, the rationale of the opinion in *City of Dallas* did not turn on the airport's previous consent to the operations they subsequently sought to prohibit. Rather, the critical holding of *City of Dallas* is that discrimination occurs not only within a class, but also between classes. *See City of Dallas*, 371 F. Supp. at 1031. Although it is accurate to say that the Authority's ban on scheduled passenger services applies equally to all airport users, this fact does not cure the discrimination occurring in this case when the Authority permits other carriers to provide unscheduled passenger services using similar planes, similar flight patterns, making the same or more noise, and carrying the same or greater number of passengers as Centennial Express would in providing scheduled passenger service, as our record here shows. Hence, even assuming that the Authority's ban on scheduled passenger service falls within the scope of the proprietary powers exception, 49 U.S.C. § 41713(b)(3), the Authority's ban on scheduled passenger service may be unenforceable because it impermissibly discriminates between classes of airport users.

Our record reflects that there are numerous other Part 135 air carriers – air carriers conducting similar flight operations using the similar aircraft and carrying the same number of passengers – at Centennial Airport. Some of these carriers are operating under an air carrier certificate identical to the one that the FAA issued to Centennial Express. With respect to noise, the King Air aircraft operated by Centennial Express is quieter than a number of other aircraft currently in use at the airport, and there are at least twenty planes operating out of the airport similar to those used by Centennial Express. The only difference between these services and those offered by Centennial Express is that Centennial Express makes its rates and destinations known to the public in advance.

Complicating matters further, the Authority's ban appears to be contrary to the purpose of a public airport – operation "for the use and benefit of the public . . . open to all types, kinds, and classes of aeronautical use on fair and reasonable terms without discrimination between such types, kinds, and classes." 14 C.F.R. § 152, app. D, ¶ 18 (1997). Absent extraordinary circumstances, a public airport, such as Centennial Airport, should not be permitted to cater to special private interests, i.e., those individuals and corporations possessing the financial resources to either own aircraft or pay the high cost of charter flights. In addition, the Authority's ban may run afoul of the FAA's long-standing policy in favor of mass-transportation over private aircraft. *See City of Dallas*, 371 F. Supp. at 1029 ("Since commercial aviation represents the right of a greater number of people to use the navigable airspace of the United States, implementation of the Congressional policy requires a preference for commercial

aircraft over private aircraft (and by implication over air cargo).").

Although other courts have discussed the definition of "discrimination" in the context of aeronautical operations,[8] whether this ban constitutes impermissible discrimination presents a complex and troublesome question because the FAA indicated in its informal letter to the Authority that it may change its policies to allow the proprietor of a single airport to discriminate against classes of users so long as the proprietor adheres to a regional plan which, as a whole, satisfies federal anti-discrimination requirements.

Turning to the three-part test articulated in *Mashpee Tribe*, I would hold that the question of whether the ban is non-discriminatory lays at the heart of the task assigned to the FAA by Congress. The determination of this question requires statutory interpretation of the ADA, particularly with respect to the proprietary powers issue because the facts present a matter of first impression regarding the scope of 49 U.S.C. § 41713(b)(3). Interpretation of the ADA is a task assigned to the FAA by Congress. *See Tivolino Teller House, Inc. v. Fagan*, 926 P.2d 1208, 1215 (Colo. 1996) (stating that an agency is charged with the administration and enforcement of its statutory scheme, and courts must give deference to administrative interpretations of statutes); *Ross v. Denver Dep't of Health & Hosps.*, 883 P.2d 516, 519 (Colo. App. 1994) (stating that interpretation of a rule or regulation by the agency

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[8] *See, e.g., City of Dallas*, 371 F. Supp. at 1029; *Western*, 658 F. Supp. at 958-59.

charged with its enforcement is generally entitled to great deference).

The issue of whether the Authority's ban is non-discriminatory also presents policy considerations properly left to the FAA. The FAA indicated in its informal letter that it currently permits multiple airports under joint ownership to allocate the operations of different classes of aircraft, but that such allocation is not permitted among airports under separate ownership. The FAA then stated:

> [Y]our letter raises a policy issue relating to how to harmonize several important goals – allowing the citizens of a region to plan and manage their aviation resources on a regional basis, while at the same time preserving and enhancing the performance of the national aviation system and ensuring that statutory and regulatory requirements associated with use of Federal grant funds are not violated. . . . We firmly support regional planning and decision-making and strongly believe that local governments should, wherever possible, plan, develop and operate their transportation systems in an integrated and regional context, *consistent with applicable Federal law*. . . .
>
> [This case presents the question of] whether the Department should initiate a change to present policy to permit two or more Federally-aided airports in an area to allocate among themselves the operations of different types of classes of aircraft, through an enforceable regional planning agreement. Because *this would be a significant policy change*, full consideration by the

> public and the aviation community is warranted. Therefore, we will be initiating, early next year, a process to obtain a full range of views on this issue. *Currently, existing policy on airport access must be complied with.*

(Emphasis added.) By holding that the Authority is permitted to ban certain classes of service in the name of regional planning, the majority intrudes upon the FAA's authority to implement and enforce its policies as mandated by Congress.

Although the FAA's letter is not binding, we have said that courts should take particular notice of the persuasive authority provided by such guidance. *See Banner Adver., Inc. v. City of Boulder*, 868 P.2d 1077, 1083 (Colo. 1994). The FAA's letter persuades me that this case raises important policy matters that should not be resolved by this court, but rather by that agency.

The second prong of *Mashpee Tribe* is whether agency expertise is required to unravel intricate, technical facts. A determination of the policy issues presented in this case requires consideration on a regional and national level of facts not developed in this record but known to the FAA. Examples of the factual issues that must be addressed are the passenger service needs of airports located in Colorado, such as Denver International Airport and Centennial Airport, and the airports located in Broomfield, Jefferson County, Greeley, and Colorado Springs, and how these services relate to the public aviation needs on a local, regional, and national level. The third prong of *Mashpee Tribe* is whether an agency determination would materially aid the court. In my view, the

state court system would benefit greatly from the expertise of the FAA in interpreting federal law, particularly on the first impression issue of proprietary powers.

Finally, I note that the FAA's informal letter to the Authority stated that the exclusion of a particular class of service is generally arbitrary and invalid. This suggests a high probability of inconsistency between the majority's decision and the FAA's decision. "[H]armony, efficiency, and prudence" dictate deference in this case. *Mashpee Tribe*, 592 F.2d at 581 n.1.[9]

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[9] Although I would hold that we should defer to the FAA on the proprietary powers and funding issues, I possess additional reservations regarding the majority's determination that the Authority's ban is non- discriminatory.

The majority states that the Authority's ban is necessary for the safe operation of the airport because Centennial Airport lacks a terminal, security, and baggage systems. *See* maj. op. at 24. However, this argument might serve to reinforce the discriminatory nature of the ban. If safe passenger service requires such facilities, then charter flights and other unscheduled passenger services available to the more affluent would also be prohibited at Centennial Airport. I question whether the Authority's ban can be characterized as a safety regulation.

The majority states that the Authority's ban is necessary to service the civil aviation needs of the public because scheduled passenger services would create congestion, disrupting the services currently available at Centennial Airport by diverting scheduled passenger services to Denver International Airport. The district court found that the airport was approaching capacity but made no findings that Centennial Express's proposed scheduled passenger service "would disrupt" current services. *Cf. Midway*, 584 F. Supp. at 439 (extensive facts supporting the determination that the airport was congested). Under accepted federal aviation principles, it appears that a

IV.

I agree with the majority that local, regional, and national planning is a priority. However, I believe the Authority's ban on scheduled passenger service must be considered in the context of the public's aviation needs on the broadest possible basis by a forum designated by Congress to determine aviation policy and to decide conflicting needs among a local area, a state, and the nation. Thus, the question of whether the Authority's ban should be considered discriminatory or arbitrary is best determined by the federal agency charged with the responsibility for such policy decisions. The FAA possesses the expertise to consider the arguments advanced by the majority in light of the aviation needs of the public for the area near Centennial and to coordinate this public need with the services offered by other airports located in Colorado. Irrespective of the precipitous action by Centennial Express and the inaction of the FAA, the FAA and not the state court system is better equipped to resolve these policy matters. We should defer to the FAA regarding the scope of the proprietary powers exception and the issue concerning federal funding violations. Hence, I respectfully dissent.

I am authorized to say that JUSTICE MARTINEZ joins in this dissent.

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proprietor of a single airport may not circumvent the federal discrimination requirements simply because another airport in the vicinity under separate ownership is in compliance with federal anti-discrimination regulations. *See Western*, 658 F. Supp. at 957-58; FAA Order 5190.6A § 4-8(d) (Oct. 2, 1989).

Supreme Court, U.S.
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Nos. 01-226 and 01-230

In the Supreme Court of the United States

ARAPAHOE COUNTY PUBLIC AIRPORT AUTHORITY, PETITIONER

v.

FEDERAL AVIATION ADMINISTRATION, ET AL.

CITY OF GREENWOOD VILLAGE, PETITIONER

v.

FEDERAL AVIATION ADMINISTRATION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidentiary record supports the Federal Aviation Administration's finding that an airport's ban on scheduled passenger service was not a lawful exercise of its proprietary powers, warranted by safety concerns and civil aviation needs.

2. Whether the ban on scheduled passenger service relates to a route or service within the meaning of 49 U.S.C. 41713(b) (1994 & Supp. V 1999).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	14
Conclusion	25

TABLE OF AUTHORITIES

Cases:

American Airlines, Inc. v. *Wolens*, 513 U.S. 219 (1995)	20, 21, 22
American Textile Mfrs. Inst., Inc. v. *Donovan*, 452 U.S. 490 (1981)	16
Arapahoe County Pub. Airport Auth. v. *Centennial Express Airlines, Inc.*, 942 P.2d 1270 (Ct. App. 1996), rev'd, 956 P.2d 587 (Colo. 1998)	7
City of Burbank v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973)	17
Martin v. *Wilks*, 490 U.S. 755 (1989)	17
Morales v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992)	4, 21, 22, 23
New York State Conference of Blue Cross & Blue Shield Plans v. *Travelers Ins. Co.*, 514 U.S. 645 (1995)	20, 22
United States v. *Johnston*, 268 U.S. 220 (1925)	16

Statutes and regulations:

Act of July 5, 1994, Pub. L. No. 103-272, § 1(a), 108 Stat. 745	21
Airline Deregulation Act of 1978:	
49 U.S.C. 40101(a)(6)	4
49 U.S.C. 40101(a)(13)	4
49 U.S.C. 41713	11
49 U.S.C. 41713(b)	14

Statutes and regulations—Continued: Page

49 U.S.C. 41713(b)(1) 4, 7, 13, 21, 22, 23
49 U.S.C. 41713(b)(3) 4, 7, 11, 14
Airport and Airway Development Act of 1970, Pub. L. No. 91-258, Tit. I, 84 Stat. 219 3
Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, Tit. V, 96 Stat. 671 (49 U.S.C. 47101 *et seq.*) 2
Employee Retirement Income Security Act of 1974, 29 U.S.C. 1144(a) 22
49 U.S.C. App. 1305(a)(1) (1988) 21
49 U.S.C. 40103(e) 2, 11
49 U.S.C. 40113(a) 5
49 U.S.C. 44706(a)(2) (Supp. II 1996) 14
49 U.S.C. 44706(f) (Supp. II 1996) 18
49 U.S.C. 46110(c) 14
49 U.S.C. 47102(18) 5
49 U.S.C. 47107(a) (1994 & Supp. V 1999) 2
49 U.S.C. 47107(a)(1) 2, 11
49 U.S.C. 47107(a)(4) 2, 11
49 U.S.C. 47107(g)(1)(A) 3
49 U.S.C. 47107(g)(2) 3
49 U.S.C. 47111(f) 3
49 U.S.C. 47115 5
49 U.S.C. 47122(a) 3
49 U.S.C. 47134(m) (Supp. V 1999) 5
14 C.F.R.:
Pt. 16 3
Pt. 139 ..... 5, 11, 14
Section 139.1 18
Pt. 152:
Section 152.1 3
App. D 3
Pt. 399:
Section 399.110(f) 5, 15

Regulations—Continued:	Page
44 Fed. Reg. (1979):	
p. 9948	4
p. 9951	4
62 Fed. Reg. (1997):	
p. 29,761	3
p. 29,766	3, 15
H.R. Rep. No. 1211, 95th Cong., 2d Sess. (1978)	4

In the Supreme Court of the United States

No. 01-226

ARAPAHOE COUNTY PUBLIC AIRPORT AUTHORITY, PETITIONER

v.

FEDERAL AVIATION ADMINISTRATION, ET AL.

No. 01-230

CITY OF GREENWOOD VILLAGE, PETITIONER

v.

FEDERAL AVIATION ADMINISTRATION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-22)[1] is reported at 242 F.3d 1213. The final decision of the

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 01-226. "Arapahoe Pet." and "Greenwood Pet." refer to the petitions for a writ of certiorari filed by the Arapahoe County Public Airport Authority and the City of Greenwood

Federal Aviation Administration (Pet. App. 23-59) is published at 1999 WL 499647.

JURISDICTION

The court of appeals entered its judgment on March 9, 2001. Petitions for rehearing were denied on May 7, 2001 (Pet. App. 60-61). The petition for a writ of certiorari in No. 01-226 was filed on August 3, 2001. The petition for a writ of certiorari in No. 01-230 was filed on August 6, 2001 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

1. The Airport and Airway Improvement Act of 1982 (AAIA), Pub. L. No. 97-248, Tit. V, 96 Stat. 671 (49 U.S.C. 47101 *et seq.*), authorizes the Federal Aviation Administration (FAA or the agency) to grant federal funds to public airports for construction and other improvement projects. The FAA may approve such grants only after receiving "written assurances" that airport sponsors will comply with numerous statutory requirements. 49 U.S.C. 47107(a) (1994 & Supp. V 1999). As pertinent here, an airport must assure that it "will be available for public use on reasonable conditions and without unjust discrimination," and that "a person providing, or intending to provide, aeronautical services to the public will not be given an exclusive right to use the airport." 49 U.S.C. 47107(a)(1) and (4). See also 49 U.S.C. 40103(e) (prohibiting grant of "an exclusive right to use an air navigation facility on which Government money has been expended").

"To ensure compliance with" the statutory grant requirements, Congress directed the FAA to

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Village, Colorado, respectively. "Greenwood Pet. App." is the appendix to the petition for a writ of certiorari in No. 01-230.

"prescribe requirements for [airport] sponsors that the [FAA] considers necessary" and authorized the agency to "approve an application for a project grant only if the [FAA] is satisfied that [those] requirements * * * have been or will be met." 49 U.S.C. 47107(g)(1)(A) and (2). The FAA has accordingly developed a standard set of assurances by which a recipient of an AAIA grant must abide. 62 Fed. Reg. 29,761 (1997).[2] For instance, under Standard Assurance 22a, an airport sponsor agrees to "make its airport available * * * for public use on reasonable terms and without unjust discrimination, to any person, firm, or corporation to conduct or to engage in any aeronautical activity for furnishing services to the public at the airport." *Id.* at 29,766. An airport "may prohibit or limit any given type, kind or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public." *Ibid.* (Standard Assurance 22i). If an airport violates the statute or a grant assurance, the FAA may seek enforcement in federal district court, or it may conduct an administrative proceeding and issue any orders necessary to carry out the airport grant program. 49 U.S.C. 47111(f), 47122(a); see 14 C.F.R. Pt. 16.

2. Before 1978, the airline industry was subject to extensive economic regulation by the former Civil Aeronautics Board (CAB). Airlines that sought to

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[2] Petitioners erroneously cite to the grant assurances set forth in 14 C.F.R. Pt. 152, App. D. That part, however, applies to grants under the Airport and Airway Development Act of 1970, Pub. L. No. 91-258, Tit. I, 84 Stat. 219, which was superseded by the AAIA. See 14 C.F.R. 152.1. The grants at issue in this case were awarded under the AAIA. See Greenwood Pet. App. 107a.

change their routes, the cities they served, and the fares they charged were required to obtain CAB approval. See H.R. Rep. No. 1211, 95th Cong., 2d Sess. 2 (1978). Congress changed that system when it enacted the Airline Deregulation Act of 1978 (ADA) and determined that the public interest would best be served by, *inter alia*, "maximum reliance on competitive market forces" and "entry into air transportation markets by new and existing air carriers and the continued strengthening of small air carriers to ensure a more effective and competitive airline industry." 49 U.S.C. 40101(a)(6) and (13).

To ensure that state and local governments would not supplant federal deregulation with their own economic "reregulation," see *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378-379 (1992), and to "prevent conflicts and inconsistent regulations," H.R. Rep. No. 1211, *supra*, at 16, the ADA added a "Preemption" provision. 49 U.S.C. 41713(b)(1). It prohibits states and political subdivisions from "enact[ing] or enforc[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." *Ibid.* As the CAB explained when implementing this provision, "[c]learly, states may not interfere with a [federally-certificated] carrier's decision on * * * which markets to serve." 44 Fed. Reg. 9948, 9951 (1979).

The ADA's preemption provision does not limit a state or political subdivision that owns or operates an airport "from carrying out its proprietary powers and rights." 49 U.S.C. 41713(b)(3). The exercise of such proprietary powers must nevertheless be "reasonable, *nondiscriminatory*, nonburdensome to interstate commerce, and designed to accomplish a legitimate State

objective in a manner that *does not conflict with the provisions and policies of the [ADA].*" 14 C.F.R. 399.110(f) (emphasis added).[3]

3. The Arapahoe County Public Airport Authority (the Airport Authority) owns and operates Centennial Airport, a public use airport near Denver that serves as a "general aviation reliever airport." Greenwood Pet. App. 64a.[4] Since 1983, the Airport Authority has applied for and received approximately $18.6 million in "discretionary" federal funding under 49 U.S.C. 47115, to be used for airport construction and improvement projects. Greenwood Pet. App. 107a-108a. To obtain this money, the Airport Authority provided the required, standard grant assurances to the FAA, including those prohibiting exclusive rights and unjust economic discrimination against classes of service. Pet. App. 24.

Operations at Centennial Airport have historically consisted of unscheduled commercial charter and air-taxi passenger and cargo service. Those operations are limited to aircraft with 30 or fewer seats because the Airport does not hold an FAA certificate under 14 C.F.R. Pt. 139 authorizing operations by larger aircraft. Greenwood Pet. App. 66a. The Airport Authority has acknowledged, however, that "scheduled or unsched-

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[3] See 49 U.S.C. 40113(a) (authorizing the Secretary of Transportation and the FAA to "prescrib[e] regulations" that they consider necessary to carry out their responsibilities under federal aviation law).

[4] "General aviation" is commonly understood to mean private and corporate operations. See 49 U.S.C. 47134(m) (Supp. V 1999). A "reliever airport" is an airport designated by the FAA "to relieve congestion at a commercial service airport and to provide more general aviation access to the overall community." 49 U.S.C. 47102(18).

uled" service by aircraft with 30 or fewer seats "may not be prohibited," and that it must consider "[r]equests for scheduled air service." *Id.* at 66a, 67a.

4. In 1985, Centennial Express Airlines (CEA) initiated discussions with the Airport Authority about commencing scheduled passenger service in small aircraft at Centennial Airport. Pet. App. 24. The Airport Authority, however, imposed a moratorium on its consideration of any such requests in April 1993. *Id.* at 26. CEA formally applied for permission to conduct scheduled passenger service the following month. The Airport Authority did not approve the application, and, on September 8, 1994, it adopted a policy resolution totally banning scheduled passenger service. *Ibid.*

CEA nevertheless began scheduled passenger service with one six-passenger aircraft between Centennial Airport and Dalhart, Texas, on December 20, 1994, pursuant to the limited authority it held under an FAA certificate. Two days later, in Arapahoe County district court, the Airport Authority obtained a temporary restraining order against CEA, which was later converted to a permanent injunction. Pet. App. 26-27.

5. In the meantime, on December 23, 1994, the U.S. Department of Transportation (DOT) sent a letter to the Airport Authority (in response to the Authority's earlier inquiry), explaining that "it was arbitrary to exclude a particular class of service for factors not reasonably related to the impacts of that service." Pet. App. 26-27. DOT stressed the limited nature of the service that CEA sought (and was authorized by the FAA) to provide, and it concluded that the Airport Authority "had not proved that the number of passengers or operations * * * would warrant a ban on scheduled service." Greenwood Pet. App. 128a.

6. In January 1995, CEA filed a complaint with the FAA, alleging that the Airport Authority's ban on scheduled service was unlawful. Pet. App. 27. CEA also appealed the state court injunction to the Colorado Court of Appeals, which unanimously reversed the injunction. *Arapahoe County Pub. Airport Auth.* v. *Centennial Express Airlines, Inc.*, 942 P.2d 1270 (Ct. App. 1996), rev'd 956 P.2d 587 (Colo. 1998). The court held that, "because the prohibition of scheduled passenger service at the Airport is related to airline prices, routes, and services, the Authority's regulation is preempted under 49 U.S.C. § 41713(b)(1) (1994)." *Id.* at at 1273. The court declined to decide whether the ban on scheduled service falls within the proprietary powers exception to the ADA's preemption provision, ruling that that determination should be made in the first instance by the FAA, before which CEA's complaint was already pending. *Id.* at 1275-1277.

In a split decision, the Colorado Supreme Court reversed. *Arapahoe County Pub. Airport Auth.* v. *Centennial Express Airlines, Inc.*, 956 P.2d 587 (1998) (Pet. App. 62-112). Three of the seven Justices joined a plurality opinion; *id.* at 63-85; one Justice concurred and concurred specially; *id.* at 85-90; two Justices dissented; *id.* at 90-112; and one Justice did not participate. *Id.* at 63. The lead opinion first held that it was not appropriate to defer to the FAA, which was not a party to the state court litigation. *Id.* at 71-74. The plurality next held that the Airport Authority's ban on scheduled service is not preempted by federal law because it does not "relate[] to a price, route, or service" within the meaning of 49 U.S.C. 41713(b)(1). Pet. App. 78. The plurality further concluded that, in any event, the Airport Authority's ban is "a valid exercise of its proprietary powers" under 49 U.S.C. 41713(b)(3), and thus

is not preempted by federal law for that additional reason. Pet. App. 81.

Turning to the conditions attached to the Airport Authority's receipt of federal grant money, the plurality found no violations. In its view, the Airport Authority's ban on scheduled service does not violate the requirement that the Airport be made available for public use without unjust discrimination because "the ban on scheduled passenger service applies to all airport users equally." Pet. App. 82-83. The plurality concluded that the ban on scheduled passenger service "is necessary to ensure the safe operation of the airport," because allowing such service "promise[s] to bring increased aviation traffic to an already congested airport." *Id.* at 83. The plurality also stated that "[i]ncreased passenger traffic also requires additional facilities such as a terminal, security and baggage systems, which are currently lacking at Centennial. Without these facilities, the airport would become unsafe for passenger use." *Ibid.* Lastly, the plurality concluded that requiring Centennial Airport to allow scheduled passenger operations would affect its role as a general aviation reliever airport. *Id.* at 83-84.

Justice Scott concurred and concurred specially. He expressly relied on the fact that the FAA had not yet acted, and assumed for purposes of disposing of the state court litigation that the FAA would have the power to preempt the Authority's policy and to enforce the conditions on the FAA's grants to the Authority. Pet. App. 86, 87-88 & n.1.

7. Several months after the Colorado Supreme Court issued its ruling, the FAA's Director of Airport Safety and Standards issued a decision concluding that the Airport Authority's ban on scheduled service violates its grant assurances and the statutory proscrip-

tions of unjust discrimination, exclusive rights, and local regulation of air carrier routes and service. Greenwood Pet. App. 106a-162a. The Director ordered the Airport Authority to submit a plan describing how it will eliminate those violations; in addition, until such plan is approved, the Airport Authority would be ineligible to apply for future grants. *Id.* at 161a-162a.

The Airport Authority requested and obtained a hearing. In his Initial Decision, the Hearing Officer concluded that the evidence and law supported the Director's determination that the Airport Authority's ban on scheduled passenger service violates federal law and grant assurances. Greenwood Pet. App. 60a-105a.

The Airport Authority and the City of Greenwood Village, Colorado, which had been allowed to intervene in the administrative proceeding, appealed. On February 18, 1999, the FAA issued its Final Agency Decision and Order, affirming the Initial Decision. Pet. App. 23-59. Noting that the agency had not been a party to, or in privity with the parties to, the state court litigation, the FAA rejected arguments that collateral estoppel barred litigation of the issues in the administrative proceeding. *Id.* at 40-45. It also concluded that the Airport Authority had failed to demonstrate that its scheduled service ban is necessary because of either safety concerns or civil aviation needs. *Id.* at 49-56.

With respect to safety, the agency found that the Airport Authority had failed to explain "how a terminal and baggage system are necessary for passenger safety," and it noted that "there is no legal requirement for security screening for the type of operation [CEA] proposed." Pet. App. 50. The FAA stressed that, while the Airport Authority has banned all scheduled service, "it permits the same sizes and types of aircraft to carry passengers in *unscheduled* operations." *Ibid.* (emphasis

added). The FAA further observed, in connection with the Authority's concern about fire safety, that "the fire department response time is no different for passengers in unscheduled operations than it is for passengers in scheduled operations." *Id.* at 51. Moreover, all operations, "whether scheduled or unscheduled, would be conducted by pilots tested and licensed by the FAA, would use aircraft certificated by the FAA for airworthiness, would follow FAA operating rules, and would follow the direction of FAA air traffic controllers." *Ibid.* The FAA also rejected the Airport Authority's claim that concerns about congestion prompted its ban on scheduled service. The FAA explained that the Authority had not only failed to show that it considered other alternatives to deal with possible congestion, it had conceded during discovery that "congestion, capacity, and environmental effects were not among the reasons for its ban on scheduled passenger service." *Id.* at 51-52.

The FAA found a similar lack of evidence to support the Airport Authority's argument that the scheduled service ban was necessary to serve civil aviation needs. The agency found that the claim that scheduled operations would change the character of Centennial Airport was "speculative," and there was no evidence suggesting that such operations would reduce general aviation use of the airport. Pet. App. 53-54. The FAA also explained that scheduled service is fully consistent with Centennial's primary function as a reliever airport, and it noted that numerous predominantly general aviation airports, including some that do not hold Part 139 certificates authorizing operations by larger aircraft, allow scheduled passenger service. *Id.* at 52 n.31, 53. In fact, the FAA pointed out, "the Denver Regional Aviation System Plan itself recognizes that an airport may be

required by its grant obligations to accept service that is inconsistent with its primary purpose." *Id.* at 54. And, in keeping with the goals of the ADA, "[i]f the public does not want or need scheduled passenger service at Centennial Airport, market forces will lead to that result." *Ibid.*

Because the Airport Authority had failed to satisfy its burden of proving that its ban on scheduled passenger service is required for either the safe operation of the airport or civil aviation needs, the FAA concluded that the ban does not fall within the Authority's reserved "proprietary powers" under 49 U.S.C. 41713(b)(3). Thus, it concluded, federal law preempts the Airport Authority's ban on scheduled service. Pet. App. 57.

The agency declined to decide what effect a 1996 federal law, which requires airports to hold a Part 139 certificate for scheduled passenger operations using aircraft with more than nine seats, would have here. The FAA explained that the issue was not presented by the facts of this case, inasmuch as the Airport Authority's ban on scheduled service was total, and the operation that CEA actually conducted used only a six-seat aircraft. Pet. App. 57 n.42.

The FAA therefore ruled that the Airport Authority is in violation of 49 U.S.C. 47107(a)(1) and Grant Assurance 22, prohibiting unjust economic discrimination; 49 U.S.C. 47107(a)(4) and 40103(e) and Grant Assurance 23, prohibiting exclusive rights; and 49 U.S.C. 41713, prohibiting local regulation of air carrier prices, routes, or services. Pet. App. 58. The agency directed the Airport Authority to file a corrective action plan and determined that, until such a plan is approved, the Authority is ineligible to apply for new federal grants. *Ibid.*

8. The Airport Authority petitioned for review of the FAA's decision, raising solely three "errors of law": (1) the Colorado Supreme Court's decision is binding on the FAA; (2) the Airport Authority—not the FAA—is responsible for determining whether its own ban on scheduled passenger service is required for the safe operation of the airport and for civil aviation needs; and (3) any scheduled passenger service must be limited to operations using aircraft with nine or fewer seats. Pet. App. 7-8. The Airport Authority did not challenge any of the factual findings made by the FAA. *Id.* at 3 n.1.[5]

The court of appeals unanimously affirmed the FAA's decision. Pet. App. 1-22. At the outset, it held that the FAA was not required to give preclusive effect to the Colorado Supreme Court's judgment for several reasons. *Id.* at 9. First, the Tenth Circuit stressed that the primary issue in the state court litigation was the propriety of the injunction prohibiting CEA from conducting scheduled passenger operations at the airport in violation of the Authority's own policy. "To the extent the Colorado Supreme Court addressed federal preemption issues and the Authority's obligations under the federal grant assurances, it did so in the narrow context of rejecting [CEA's] defenses." *Id.* at 10. Moreover, the court of appeals pointed out, the state supreme court's conclusion that the Airport Authority had not violated federal grant assurances "lacks the

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[5] Greenwood intervened, raising issues not raised by the Airport Authority. Assuming, but explicitly not deciding, that Greenwood's intervention was proper, the court of appeals held that there were no extraordinary circumstances that would justify Greenwood's presentation of issues not brought before the court by the Authority as petitioner. Pet. App. 6-7 n.4. Greenwood does not seek review of that ruling in its petition before this Court. Greenwood Pet. i.

depth and breadth of analysis given to those same issues" by the three levels of administrative review at the FAA. *Ibid.* In addition, the court noted that the state supreme court was seriously divided, with only three of the seven justices joining the plurality decision. *Ibid.* "Last, but certainly not least, the FAA was not a party to, nor in privity with a party to, the state court proceedings." *Id.* at 11.

The court of appeals next concluded that determining whether the Airport Authority had complied with the conditions imposed on it by federal aviation law and under the terms of its federal grant agreements is a federal matter. If the state court's ruling were deemed preclusive, it "would frustrate the FAA's ability to discharge its statutory duty to interpret and implement federal aviation statutes governing the enforcement of grant assurances." Pet. App. 14.

The court of appeals then turned to the Airport Authority's claim that its ban on scheduled passenger service is within its proprietary powers and is justified by safety concerns and civil aviation needs. Preliminarily, the court "easily conclude[d]" that the ban on scheduled passenger service "relates to both services and routes" within the meaning of the preemption provision, 49 U.S.C. 41713(b)(1). Pet. App. 16. The court next "assume[d], without deciding, that regulatory conduct related to safety and civil aviation needs may fall under the 'proprietary powers'" exception to the preemption provision. *Id.* at 18. The court explained, however, that whether the Airport Authority's total ban on scheduled passenger service is justified by safety or civil aviation needs is a "factual" determination that the Authority had the burden of proving.

Id. at 19. Given the deference due the FAA's findings,[6] and based on its own "careful review of the administrative record," the court found "a dearth of evidence to support the Authority's claim that the ban on scheduled service is necessary due to ground congestion, operational safety and environmental impact concerns." *Ibid.* See *id.* at 19-21 & n.10. The court therefore held that the Airport Authority had "exceeded its legitimate scope of power as a state or local government" under 49 U.S.C. 41713(b)(3), and its ban on scheduled service is peempted by federal law. Pet. App. 21.

Finally, the court of appeals declined to decide what effect the 1996 statutory amendment, requiring airports to hold Part 139 certificates for operations by aircraft with more than nine seats (see 49 U.S.C. 44706(a)(2) (Supp. II 1996)), might have on this case. Like the FAA, the court concluded that that issue was "not presented by the facts in this case." Pet. App. 22.

ARGUMENT

1. The Airport Authority presents the question whether an airport proprietor, pursuant to the "proprietary powers" exception to the preemption provision in 49 U.S.C. 41713(b), may ban scheduled passenger service when "necessary for the safe operation of its airport or to serve the civil aviation needs of the public." Arapahoe Pet. i. Greenwood presents essentially the same question. Greenwood Pet. i (Question 2). The court of appeals correctly resolved that issue, and further review is not warranted.

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[6] Under 49 U.S.C. 46110(c), the FAA's findings of fact are "conclusive" if supported by substantial evidence.

The Authority and Greenwood suggest that the court of appeals erroneously concluded, as a matter of law, that the Authority's prohibition of scheduled service is not within the scope of its proprietary powers. See Arapahoe Pet. 11, 12; Greenwood Pet. 4, 26-30. The arguments of the Airport Authority and Greenwood, however, reflect a fundamental misunderstanding of the court of appeals' ruling.

The court of appeals explicitly "assume[d], without deciding, that regulatory conduct related to safety and civil aviation needs may fall under the 'proprietary powers' umbrella." Pet. App. 18. The FAA's standard grant assurances also recognize that an airport "may prohibit or limit any given type, kind or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public." 62 Fed. Reg. at 29,766 (Standard Assurance 22i). See also 14 C.F.R. 399.110(f) (exercise of proprietary powers must be "reasonable, nondiscriminatory, nonburdensome to interstate commerce, and designed to accomplish a legitimate State objective" in a manner that does not conflict with ADA). Thus, there is no dispute in this case that, as a *legal* matter, it is possible for an airport that receives federal funding to prohibit certain passenger service, if such action is required for safety or civil aviation needs.

The Airport Authority and Greenwood, however, have overlooked the essence of the court of appeals' ruling. The determination whether safety concerns or civil aviation needs justified the ban on scheduled passenger service was "a factual one for which the Authority, as the party asserting the justification, [bore] the burden of proving before the agency." Pet. App. 19. The court of appeals' ruling was based on the "dearth of

evidence to support the Authority's claim that the ban on scheduled service is necessary due to ground congestion, operational safety and environmental impact concerns," and on the Authority's "fail[ure] to demonstrate" how the ban would serve the needs of civil aviation. *Id.* at 19, 21. Not only did the court find substantial evidence to support the FAA's findings in this regard (see *id.* at 49-56), its own "careful review of the administrative record" revealed that the testimony on behalf of the Airport Authority was "largely speculative" and "effectively rebutted" by the FAA's evidence. *Id.* at 19, 20. Petitioners do not seek review of that assessment of the factual record by the court of appeals, and that fact-bound issue would not in any event warrant review by this Court.[7]

Indeed, the Airport Authority did not directly dispute the FAA's factual findings in the court of appeals. See Pet. App. 3 n.1, 7-8. As the Authority concedes (Arapahoe Pet. 15), it simply relied instead on statements in the plurality opinion of the Colorado Supreme Court to the effect that the "ban on scheduled passenger service is necessary to ensure the safe operation of the airport" and to serve the needs of civil aviation. Pet. App. 83. Those statements, however, lack support with citations to any evidence in the record.[8] More

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[7] In keeping with its well established practice of not granting certiorari "to review evidence and discuss specific facts," *United States* v. *Johnston*, 268 U.S. 220, 227 (1925), the Court considers whether substantial evidence supports an administrative agency's findings of fact only in "'the rare instance when [that] standard appears to have been misapprehended or grossly misapplied' by the court below," *American Textile Mfrs. Inst., Inc.* v. *Donovan*, 452 U.S. 490, 523 (1981).

[8] Cf. Pet. App. 110, 111 n.9 (Bender, J., dissenting) (noting lack of factual development and findings in the state court litigation).

important, as the court of appeals held, those statements were not binding on the FAA—which was not a party to the state court litigation—or entitled to any preclusive effect, as the Airport Authority had urged. *Id.* at 15; see *id.* at 8-14. Neither the Airport Authority nor Greenwood challenges that particular ruling here. Even if they did, the court of appeals' ruling is correct. It is well established that "one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Martin* v. *Wilks*, 490 U.S. 755, 761 (1989) (quoting *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940)).

Nor is there a conflict even on the underlying factual issue. The Colorado Supreme Court plurality reached its conclusion based on the record before it, and it was not reviewing an FAA decision. The Tenth Circuit reached its conclusion based on a different record, and based on its obligation to defer to FAA findings that are supported by substantial evidence. There is therefore no true conflict between Tenth Circuit and the Colorado Supreme Court plurality on that factual issue, much less a conflict that would warrant this Court's review. That is particularly true since only three of the seven Justices on the Colorado Supreme Court concluded that the FAA would not have authority to reach a different conclusion. Pet. App. 11.

2. The Authority also errs in contending that the agency's decision "requires [it] to expand and build * * * scheduled passenger service facilities." Arapahoe Pet. 14; see also *id.* at 15, 18.[9] In the admini-

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[9] In this connection, the Airport Authority cites out of context an October 1999 FAA Task Force Study. Arapahoe Pet. 14-15, 18. That study was prepared months after the FAA decision at issue,

strative proceeding, it was the Airport Authority that insisted that a terminal, baggage claims system, and security screening were necessary for safety reasons. Pet. App. 49. The FAA explicitly rejected those claims, noting that the Authority had failed to explain why such facilities were necessary or required. *Id.* at 50 & nn.25 & 26.[10]

With respect to safety and the airport's facilities in general, the agency also pointed out that "[t]he airport already has weight limits for its runways that would keep out aircraft that are too large to operate safely." Pet. App. 50 n.27.[11] Further, while the Airport Authority bans scheduled service, "it permits the same sizes and types of aircraft to carry passengers in unscheduled operations." *Id.* at 50.[12] As for fire safety, the FAA

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is not part of the administrative or court of appeals record, and has no relevance here.

[10] For example, aircraft size determines whether security screening is required, and, under current FAA regulations, the carrier, not the airport, ordinarily provides such screening. Pet. App. 50 n.26. Bills pending before Congress would, if enacted, have the potential to alter current screening requirements and responsibilities, but would still not transfer responsibility for passenger screening to airport operators.

[11] The Airport Authority intimates that the FAA's decision would require it to obtain a Part 139 certificate, which would allow aircraft with more than 30 seats to conduct operations at Centennial Airport. See 14 C.F.R. 139.1. Neither the agency's decision nor the law supports that suggestion. See 49 U.S.C. 44706(f) (Supp. II 1996) ("Nothing in this title may be construed as requiring a person to obtain an airport operating certificate if such person does not desire to operate an airport described in subsection (a).").

[12] See also Pet. App. 95 n.4, 107 (Bender, J., dissenting) (noting that numerous carriers conduct unscheduled operations at Cen-

observed that "the fire department response time is no different for passengers in [those] unscheduled operations than it is for passengers in scheduled operations." *Id.* at 51. Finally, "all operations at the airport, whether scheduled or unscheduled, would be conducted by pilots tested and licensed by the FAA, would use aircraft certificated by the FAA for airworthiness, would follow FAA operating rules, and would follow the direction of FAA air traffic controllers." *Ibid.*

The FAA likewise addressed the Airport Authority's concern "that permitting scheduled passenger service would conflict with Centennial Airport's designation as a general aviation reliever airport, and that the FAA should defer to regional and local planning." Pet. App. 53. The agency found that "[t]he initiation of scheduled passenger service at Centennial Airport is unlikely to change the predominantly general aviation role of the airport" (*ibid.*), and claims to the contrary were simply not supported by the record (see *id.* at 53 & nn.33 & 34). If Centennial's role as a reliever airport were ever undermined by scheduled passenger service, however, alternatives other than a total ban on such service should be attempted first. *Id.* at 54.[13] The FAA also noted that "the Denver Regional Aviation System Plan itself recognizes that an airport may be required by its grant obligations to accept service that is inconsistent with its primary purpose." *Ibid.*

Thus, the FAA's decision neither requires the Airport Authority to construct or expand any facilities nor alters Centennial's status as a general aviation reliever

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tennial Airport similar to the scheduled service that CEA sought to provide).

[13] See, *e.g.*, Pet. App. 53 n.33 ("the Airport Authority has taken no significant actions to limit overall growth").

airport. Rather, the Authority is obliged to develop and submit a plan explaining how it will comply with federal laws and previously agreed upon grant conditions, and, until it does so, it is not entitled to apply for any additional federal grants. This remedy provides the Authority with substantial discretion in developing a corrective action plan.

3. The Airport Authority requests the Court to establish "a standard * * * by which lower courts may determine when a matter truly impacts the national aviation system as opposed to being a matter of proprietary power." Arapahoe Pet. 16. Greenwood makes a similar request. Greenwood Pet. 25. There is no indication that the lower courts are experiencing the kind of difficulty distinguishing between the two that would warrant this Court's review. Further, this case does not present an appropriate occasion for resolution of any such general issue. As previously explained, the court of appeals "assume[d], without deciding," that the scope of an airport's proprietary powers may be sufficient to encompass the power to ban scheduled passenger service, where the record establishes that such a ban is justified by safety concerns or the needs of civil aviation. Pet. App. 18. Thus, the court of appeals' decision is attributable to the Airport Authority's failure to prove such justification, not to the court's failure to define the Authority's powers broadly enough.

4. Greenwood presents an additional question, asking the Court to resolve an alleged "inconsistency" or "potential contradiction" between *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219 (1995), and *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Insurance Co.*, 514 U.S. 645 (1995). Greenwood Pet. 21, 22; see also Pet. i (Question 1). There is, however, no such inconsistency.

a. In *Wolens*, the Court examined the ADA's preemption provision, which prohibits States and political subdivisions from "enact[ing] or enforc[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." 49 U.S.C. 41713(b)(1).[14] The Court held that this provision "bars state-imposed regulation of air carriers, but allows room for court enforcement of contract terms set by the parties themselves." 513 U.S. at 222. In doing so, the Court overturned a state court judgment that permitted a class action complaint about an airline's frequent flyer program to proceed under a state consumer fraud statute. *Id.* at 226.

The Court in *Wolens* found no need to "dwell on the question whether plaintiffs' complaints state claims 'relating to [air carrier] rates, routes, or services," 513 U.S. at 226, inasmuch as it had recently addressed that matter in *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992). *Morales* explained that the phrase "relating to" in the ADA's preemption provision "express[es] a broad pre-emptive purpose." *Id.* at 383. Thus, the Court held, *id.* at 384, that "[s]tate enforcement actions having a connection with, or reference to, airline 'rates, routes, or services' are pre-empted under [49 U.S.C. 41713(b)(1)]."[15] Applying that principle to

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[14] At the time of the *Wolens* litigation, the preemption provision appeared at 49 U.S.C. App. 1305(a)(1) (1988). Federal aviation laws were officially codified and renumbered "without substantive change" in 1994. Act of July 5, 1994, Pub. L. No. 103-272, § 1(a), 108 Stat. 745.

[15] In rendering this broad interpretation, the *Morales* Court specifically rejected the argument that the provision "only preempts the States from actually prescribing rates, routes, or services." 504 U.S. at 385.

the facts of *Morales*, the Court concluded that enforcement guidelines issued by state attorneys general regarding allegedly deceptive airline fare advertising clearly "'relate[d] to' airline rates," 504 U.S. at 388, and thus were preempted by the ADA, *id.* at 391. Similarly, in *Wolens*, 513 U.S. at 226, the Court concluded that plaintiffs' frequent flyer complaints related to an airline's "rates" and "services."

Unlike *Morales* and *Wolens*, which involved the ADA's preemption provision, *Travelers* addressed the preemption provision in a different statute—the Employee Retirement Income Security Act of 1974 (ERISA), which states that ERISA "shall supersede any and all State laws insofar as they * * * relate to any employee benefit plan" covered by the statute. 29 U.S.C. 1144(a). The Court in *Travelers* held that a state law that required hospitals to collect surcharges from patients whose insurance coverage was purchased by employee health-care plans governed by ERISA did not "'relate to' employee benefit plans within the meaning of ERISA's pre-emption provision." *Travelers*, 514 U.S. at 649. Citing neither *Morales* nor *Wolens*, *Travelers* focused on "the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Id.* at 656.

Thus, there is no inconsistency between *Wolens* and *Travelers*. The cases involved different statutes with different purposes, and the issues resolved in the two cases were unrelated to each other.

b. In the state court litigation, CEA argued that the Authority's ban on scheduled passenger service was preempted by the ADA, 49 U.S.C. 41713(b)(1). The Colorado Supreme Court plurality discussed *Morales*, *Wolens*, and *Travelers*, and, despite the fact that *Morales* and *Wolens* involved the ADA, it concluded

that *Travelers* provided the most relevant guidance. Pet. App. 75-77. Disregarding this Court's explicit instruction in *Morales*, 504 U.S. at 383, that the phrase "related to a price, route, or service of an air carrier" in ADA Section 41713(b)(1) be given a "broad" interpretation, the state court concluded that the ban on scheduled passenger service does not "relate to" airline services "because it does not concern typical service-oriented tasks such as ticketing, boarding procedures, providing meals and drinks to passengers, and baggage handling." Pet. App. 78. The Colorado Supreme Court plurality likewise concluded that "the Authority is not regulating airline fares or routes because the ban on scheduled service does not delineate what airlines can charge or where they can fly." *Ibid.*

In contrast, the Tenth Circuit, citing *Morales* and *Wolens*, "easily conclude[d that] the Authority's ban is connected with and relates to both services and routes." Pet. App. 16. The court explained that, "[b]y banning scheduled passenger service, the Authority has affirmatively curtailed an air carrier's business decision to offer a particular service in a particular market." *Id.* at 16-17. Moreover, the ban affects route determinations "because the carrier cannot conduct regular operations over any route involving the banned airport." *Id.* at 17.

As Greenwood points out (Greenwood Pet. 20-21, 23), the court of appeals and Colorado Supreme Court plurality reached different conclusions on the meaning of the preemption provision. For several reasons, however, that disagreement does not warrant this Court's review.

First, the court of appeals is clearly correct. Its interpretation is supported by the plain meaning of the preemption provision and this Court's authoritative construction of that provision. In contrast, the Colorado

Supreme Court plurality ignored both the plain meaning of the provision and this Court's construction of it, and instead applied a decision that interpreted a preemption provision of a different statute.

Second, that issue was neither raised nor briefed by the parties in the court of appeals. See Pet. App. 7-8 (identifying the three errors of law raised by the Authority in its appeal); *id.* at 6 n.4, 8 n.6 (describing the issues raised by Greenwood); *id.* at 17-18 ("the Authority largely evades a direct discussion of the preemption issue in its briefs to this court").[16] The court of appeals therefore addressed the issue only briefly and as a prelude to the issues actually before it.

Third, as the court of appeals in this case noted, only three of the seven Justices on the Colorado Supreme Court concluded that the Authority's ban against scheduled passenger service was not preempted by federal law. Pet. App. 11; see pp. 7, 8, *supra*. Now that the FAA has determined that the Authority's ban violates federal law and the Authority's own assurances, there is no reason to believe that even the plurality of the Colorado Supreme Court would necessarily reach the same conclusion in the future.

Fourth, these are the first two decisions of which we are aware that address the application of the preemption provision to a prohibition against scheduled service. Particularly since the first decision was rendered without the benefit of the FAA's views, and the second decision was rendered without briefing on the issue, that issue would benefit from further

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[16] Indeed, the appellate briefs and rehearing petitions filed by the Airport Authority and Greenwood do not discuss or even cite *Morales*, *Wolens*, or *Travelers*.

ventilation in the lower courts. Review at this time therefore would be premature.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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No. 01-226

In The

Supreme Court of the United States

ARAPAHOE COUNTY PUBLIC AIRPORT AUTHORITY,

Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an airport proprietor, pursuant to the proprietary powers exception, 49 U.S.C. § 41713(b)(3), and the Supremacy Clause of the United States Constitution, U.S. Const. Article VI, cl. 2, may ban an aeronautical use at its airport, such as scheduled passenger service, as necessary for the safe operation of its airport or to serve the civil aviation needs of the public, when the airport proprietor is expressly granted such power by federal regulation and federal grant agreement and when the aeronautical use had not previously operated at the airport.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

SUMMARY OF ARGUMENT 1

ARGUMENT 2

1. The Petition For Writ Of Certiorari Of The Airport Authority Should Be Granted Because Of The Conflicting Decisions Of The Tenth Circuit And The Colorado Supreme Court On The Proprietary Powers Statute 2

2. Why A Standard Is Necessary Which Delineates Between The FAA's Regulation Of The Operation Of Aircraft And An Airport Owner's Regulation Of Its Ground Space 4

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

American Airlines, Inc. v. Department of Transp., 202 F.3d 788 (5th Cir. 2000), *cert. denied*, 530 U.S. 1284 (2000) 4

Arapahoe County Pub. Airport Auth. v. Centennial Express Airlines, Inc., 956 P.2d 587 (1998) 3, 6

City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) 5

STATUTES

49 U.S.C. § 41713(b)(3) 1, 3, 5

49 U.S.C. § 47106 7

RULES

Sup. Ct. R. 10(a) 2

REGULATIONS

14 C.F.R. Part 152, App. D ¶ 18 .....6, 7

LEGISLATIVE MATERIALS

Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) 5

Airport and Airway Improvement Act of 1982, Pub. L. 97-248, 96 Stat. 695 (1982) 7

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Arapahoe County Public Airport Authority ("Airport Authority") respectfully submits its Reply Brief in Support of its Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

This Court should grant the Airport Authority's Petition for Writ of Certiorari for the following reasons. First, on the same basic facts, there is a direct conflict between the decisions of the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") and the Colorado Supreme Court on the proprietary power of the Airport Authority to ban scheduled passenger service and whether such ban violates grant assurances given by the Airport Authority to the Federal Aviation Administration ("FAA"). The essence of the conflict is the Airport Authority's power to ban scheduled passenger service, when it has never allowed such service and does not have the facilities, including security, for such service. The Airport Authority respectfully submits that never has the time been so relevant, with the conflict so clear, for a decision from the Court on this issue. Second, a standard should be established by this Court by which lower courts may determine when a matter truly impacts the national aviation system as opposed to being a matter of local, proprietary power and right. This Court has never rendered a decision pertaining to the proprietary powers statute, 49 U.S.C. § 41713(b)(3). Further, legislative history supports that, as opposed to operation of aircraft,

matters pertaining to the ground space of an airport, e.g., determining the sufficiency of facilities for scheduled passenger service, are within the proprietary powers and rights of the local airport operator. The FAA has been encroaching into this area traditionally reserved for airport proprietors. This encroachment manifested itself in the FAA seeking to impose scheduled passenger service at Centennial Airport when the facilities for such service do not exist.

ARGUMENT

1. The Petition For Writ Of Certiorari Of The Airport Authority Should Be Granted Because Of The Conflicting Decisions Of The Tenth Circuit And The Colorado Supreme Court On The Proprietary Powers Statute.

The Brief for the Federal Respondent in Opposition ("Brief in Opposition") focuses on the factual record of the FAA proceeding, thereby seeking to avoid addressing the basis for the filing of the Airport Authority's Petition for Writ of Certiorari – the direct conflict between the Tenth Circuit and Colorado Supreme Court opinions on a federal question.[1] The federal question is whether the Airport Authority may ban scheduled passenger service,

[1] This Court's Rule 10(a) specifies that one of the reasons this Court considers in exercising its judicial discretion to grant a petition for writ of certiorari is whether a United States Court of Appeals "has decided an important federal question in a way that conflicts with a decision by a state court of last resort. . . ." Sup. Ct. R. 10(a).

based on the proprietary powers exception to preemption, which exception is codified at 49 U.S.C. § 41713(b)(3), when adequate facilities, including security for such service, do not exist and when such service has never been allowed at Centennial Airport. On the same basic facts, the Colorado Supreme Court ruled in favor of the Airport Authority and the Tenth Circuit ruled against the Airport Authority. See Airport Authority's Petition for Writ of Certiorari ("Petition") at 10-11.

The Airport Authority submits that the direct conflict between the Tenth Circuit and the Colorado Supreme Court is indisputable. The Colorado Supreme Court opinion best defines the conflict: "The power to control an airport's size exists at the core of the proprietor's function and is especially strong where, as here, the prohibited use has never been allowed, or even contemplated." (citation omitted). *Arapahoe County Pub. Airport Auth. v. Centennial Express Airlines, Inc.*, 956 P.2d 587, 595 (1998) (App. at 80-81). It remains a question, of course, whether this Court will exercise its judicial discretion and resolve the conflict. However, in view of the unspeakable events of September 11, 2001, never has the time been so relevant, with the conflict so clear, for a decision from the Court on this issue. The Airport Authority's position is that because it does not have the facilities, including security and baggage facilities, and it has never allowed scheduled passenger service, it may ban such service, as necessary for the safe operation of the airport.

2. Why A Standard Is Necessary Which Delineates Between The FAA's Regulation Of The Operation Of Aircraft And An Airport Proprietor's Regulation Of Its Ground Space.

The FAA questions why it is necessary for this Court to set a standard by which lower courts may determine when a matter truly impacts the national aviation system as opposed to being a matter of local proprietary power. The FAA argues that it is unnecessary because there is little indication that the lower courts need such assistance and this Petition is not the appropriate vehicle because the Airport Authority failed to meet its burden of proof in the FAA proceeding. FAA Brief in Opposition at 20.[2] The Airport Authority disagrees.

The Airport Authority understands that the granting of certiorari is a matter of this Court's discretion. The Airport Authority acknowledges that the issue may appear narrow, but submits that it is of great significance. It involves an airport proprietor's power and right to ban the origination of scheduled passenger service when it does not have the facilities, including security, for such service. The Airport Authority, accordingly, submits there are several reasons why this Court should exercise its

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[2] In the absence of the conflict between the Tenth Circuit and the Colorado Supreme Court, there may have been an issue whether the FAA's interpretation of the proprietary powers exception is to be reviewed *de novo* or with deference, but, in all events, the Airport Authority submits, it is a legal and not a factual issue. *See American Airlines, Inc. v. Department of Transp.*, 202 F.3d 788, 804-805 (5th Cir. 2000), *cert. denied*, 530 U.S. 1284 (2000).

judicial discretion to grant the Petition and proceed to set the standard.

First, this Court has never addressed the proprietary powers exception, 49 U.S.C. § 41713(b)(3), so there is absolutely no guidance from this Court in this area. Petition at 15-16. Second, the legislative history cited by Justice Rehnquist in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 644 (1973) and the legislative history of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) support that Congress intended an airport proprietor to regulate the ground space of its airport. This legislative history supports that the airport proprietor is the entity intended to determine whether the facilities – such as security to protect users and baggage facilities – are available to accommodate scheduled passenger service. Petition at 16-18. Third, in the vacuum of any guidance from this Court, the FAA is now expanding into areas traditionally left to the airport proprietor, thus resulting in the present conflict.

As one commentator has noted, these ground space/facility decisions had traditionally been left to the airport proprietor. The FAA now encroaches into this area previously reserved for airport proprietors by seeking to impose an aeronautical use on an airport even if the facilities are not available. Petition at 13-15. In this case, it means that the Airport Authority, which was not designed or constructed for scheduled passenger service, lacking even in the basic security to protect users, must allow scheduled passenger service or be denied eligibility for federal funds. The FAA continues to reject, post September 11, 2001, the Airport Authority's position that these facilities are necessary because "the Authority had

failed to explain why such facilities were necessary or required." Brief in Opposition at 18. (citation omitted). From the Airport Authority's perspective, the FAA not only ignored the Airport Authority's and the Colorado Supreme Court record but also ignored common knowledge that commercial airports such as Logan International Airport, LaGuardia Airport, Ronald Reagan Washington National Airport, Washington Dulles International Airport and Denver International Airport operate with terminals, parking, baggage facilities and security – one could not comprehend that they would do otherwise.[3] The Airport Authority is astounded that post September 11, 2001, the FAA would maintain this position. The Colorado Supreme Court recognized in 1998: "Without these facilities, the airport would become unsafe for passenger use." *Arapahoe County Pub. Airport Auth.*, 956 P.2d at 596 (App. at 83).[4]

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[3] The FAA also continues to comment that the Airport Authority allows unscheduled operations with similar aircraft. Brief in Opposition at 18. As noted, for scheduled passenger service certain facilities are necessary for the safe operation of the airport, such as security and baggage facilities.

[4] There is one final matter which the Airport Authority wishes to note. The Brief in Opposition erroneously states that the Airport Authority erroneously cites to 14 C.F.R. Part 152, App. D ¶ 18. ("Part 152"). *See* Brief in Opposition at 3 n.2. The Airport Authority disagrees. The record establishes that the Airport Authority's grant agreements date to 1967 and totaled $30.1 million as of the Colorado Supreme Court opinion. *See Arapahoe County Pub. Airport Auth.*, 956 P.2d at 589, 600 (App. at 63-64, 92). The Airport Authority's grant agreements pertaining to land acquisition remain in effect. The Final Agency Decision

CONCLUSION

For the reasons set forth herein, and its Petition for Writ of Certiorari, the Airport Authority respectfully requests that its Petition for Writ of Certiorari be granted.

Dated November 15, 2001.

Respectfully submitted,

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and Order did not limit the grants at issue nor the applicability of Part 152. *See* App. at 23-59. The grant agreements and Part 152 support the Airport Authority's proprietary power to ban scheduled passenger service as necessary for the safe operation of the airport and to serve the civil aviation needs of the public. Further, Part 152 has not been superseded or repealed. *See* Airport and Airway Improvement Act of 1982, Pub. L. 97-248, § 523(c)(1), 96 Stat. 695 (1982) ("All . . . regulations . . . which have been issued, made, granted, or allowed to become effective by the . . . Secretary . . . or any provision of the Airport and Airway Development Act of 1970 . . . which are in effect at the time this title takes effect, are continued in effect according to their terms until modified, terminated, superseded, set aside, or repealed by the Secretary . . . or by operation of law.") Part 152 remains in effect today. *See* 14 C.F.R. Part 152, App. D. ¶ 18 (2001). The regulation now cites, in part, as its authority, 49 U.S.C. § 47106. *See* 14 C.F.R. Part 152 (2001) at 129. 49 U.S.C. § 47106(d) is relied upon by the FAA to assert that the Airport Authority is ineligible to apply for new FAA grants. *See* App. at 58. The Brief in Opposition, thus, is both factually and legally incorrect.